

TAB B

Volume: I

Pages: 1 - 183

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Case No. 04-CV12333-MEL

CASAS, BENJAMIN & WHITE, LLC,

Plaintiff,

v.

THE POINTE GROUP, INC., a Massachusetts corporation,

d/b/a The Pointe Group Healthcare and Senior Living;

GERALD S. FREID; BARRY FREID; and KEY CORPORATE

CAPITAL, INC.,

Defendants.

DEPOSITION OF STEPHEN F. GORDON

Thursday, June 9, 2005

Conn, Kavanaugh, Rosenthal, Peisch & Ford, LLP

10 Post Office Square

Boston, Massachusetts

10:20 a.m.

Reporter: Linda M. Grieco

320 Congress Street, Boston, MA 02210

06/09/2005

Stephen F. Gordon

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3	STEPHEN F. GORDON	3	It is stipulated by and between counsel
4	By Ms. Higgins 5	4	for the respective parties that the deposition is to
5	By Ms. Worcester 177	5	be read and signed by the deponent under the pains
6		6	and penalties of perjury within 30 days of receipt
7		7	of the transcript; and that the sealing and filing
8		8	thereof are waived; and that all objections, except
9		9	as to form, and motions to strike are reserved to
10	EXHIBITS	10	the time of trial.
11	No. Page	11	* * * * *
12	70 Subpoena 6	12	STEPHEN F. GORDON,
13	71 4/4/05 Letter from Mr. Gordon to	13	a witness called by counsel for the Plaintiff,
14	Ms. Higgins 8	14	having been satisfactorily identified by the
15	72 Answer 21	15	production of his driver's license, and duly sworn
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17	74 E-mail re Engagement Letter 35	17	follows:
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24	80 E-mails 5/27 from Mr. Sucoff 81	24	first exhibit.

<p style="text-align: right;">Page 6</p> <p>1 (Exhibit 70 marked for identification.)</p> <p>2 Q. Mr. Gordon, I'm sure you've taken, attended,</p> <p>3 defended many depositions in your career. So I'm</p> <p>4 not going through all the rules applicable to a</p> <p>5 witness in a deposition setting. But I'll just</p> <p>6 remind you of those that I think it's difficult for</p> <p>7 lawyers who are witnesses to remember, which is to</p> <p>8 please let me finish my question before you start</p> <p>9 answering so that the court reporter can take down</p> <p>10 my questions and your answers clearly. Obviously</p> <p>11 you know that if you need a break or something like</p> <p>12 that, to let me know. If you don't understand one</p> <p>13 of my questions, you can tell me so, and I'll try to</p> <p>14 rephrase it in a way that's more comprehensible.</p> <p>15 The first exhibit I'm handing you marked as Exhibit</p> <p>16 70 is the subpoena that was served on you for your</p> <p>17 deposition today.</p> <p>18 (Document exhibited to witness.)</p> <p>19 Q. Do you recall receiving the subpoena at your</p> <p>20 office?</p> <p>21 A. I do.</p> <p>22 Q. You notice that the subpoena asks you to</p> <p>23 appear for your deposition and to bring with you</p> <p>24 documents as identified on attached schedule A?</p>	<p style="text-align: right;">Page 8</p> <p>1 to the production, are you referring to the April</p> <p>2 4th letter that you sent to me?</p> <p>3 A. I don't recall the date.</p> <p>4 MS. HIGGINS: Let's mark as the next</p> <p>5 exhibit.</p> <p>6 (Exhibit 71 marked for identification.)</p> <p>7 (Document exhibited to witness.)</p> <p>8 Q. Mr. Gordon, is the April 4, 2005 letter from</p> <p>9 you to me the letter that you referred to as stating</p> <p>10 your objection to the subpoena?</p> <p>11 A. I don't know if this is the first time. I</p> <p>12 can't tell. What you've handed me as Exhibit 71 has</p> <p>13 a date of April 4th on the first page and March 24th</p> <p>14 on the second page. So I don't know. I don't know</p> <p>15 whether March 24th is simply an error or whether</p> <p>16 there was a prior letter on March 24th.</p> <p>17 Q. Okay. You see in the second paragraph of</p> <p>18 the document that's been marked as Exhibit 71, the</p> <p>19 first sentence you say "with respect to John</p> <p>20 McCullough and me." That's you, correct?</p> <p>21 A. That is me.</p> <p>22 Q. "We have in connection with your document</p> <p>23 request to The Pointe Group produced all of the</p> <p>24 non-privileged documents in our respective</p>
<p style="text-align: right;">Page 7</p> <p>1 A. Well, it requests the production of</p> <p>2 documents actually at a different time.</p> <p>3 Q. Okay. Did you make such a production?</p> <p>4 A. No.</p> <p>5 Q. When you received the subpoena, did you</p> <p>6 conduct any search of your documents to see if you</p> <p>7 had documents responsive to the request?</p> <p>8 A. I did not conduct an additional search.</p> <p>9 Q. Did you review the request to -- strike</p> <p>10 that.</p> <p>11 When you say you didn't conduct an</p> <p>12 additional search, you're referring to the fact that</p> <p>13 prior to your receipt of the subpoena, the entity</p> <p>14 and individuals that you represent made a document</p> <p>15 production?</p> <p>16 A. Correct.</p> <p>17 Q. And when you received the subpoena, did you</p> <p>18 review the request to insure that the documents that</p> <p>19 had been produced encompassed all of these requests</p> <p>20 attached to your subpoena?</p> <p>21 A. No.</p> <p>22 Q. Is there any reason why you didn't do that?</p> <p>23 A. I made objection to the production.</p> <p>24 Q. Okay. When you say that you made objection</p>	<p style="text-align: right;">Page 9</p> <p>1 possessions." Do you see that?</p> <p>2 A. I do.</p> <p>3 Q. Then you go on to say, "Consequently,</p> <p>4 although there are no further documents to produce,</p> <p>5 for the sake of clarity I want to express my and</p> <p>6 John's objection to the production of documents</p> <p>7 pursuant to your subpoena." Do you see that?</p> <p>8 A. I do.</p> <p>9 Q. When you say that there were no additional</p> <p>10 documents to produce, you're referring to the fact</p> <p>11 that this subpoena had requested a production of</p> <p>12 documents, and that your position as stated in this</p> <p>13 letter was that there were no additional documents</p> <p>14 responsive to the subpoena, other than those that</p> <p>15 had already been produced?</p> <p>16 A. That's my understanding, yes.</p> <p>17 Q. But when you made this statement, you hadn't</p> <p>18 reviewed the subpoena to whether it asked for</p> <p>19 additional documents; is that right?</p> <p>20 A. I looked at this subpoena. I can't tell you</p> <p>21 when I did, but I looked at the subpoena.</p> <p>22 Q. Before you said you didn't look at the</p> <p>23 schedule to the subpoena. But now you're saying</p> <p>24 that you did?</p>

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<p style="text-align: right;">Page 10</p> <p>1 A. I believe I've looked at this schedule many 2 times. 3 Q. You then went on to say, "I want to express 4 my and John's objections to the production of 5 documents pursuant to your subpoenas." Now I'm 6 referring just to the subpoena that was served on 7 you. What was the basis of your objection to the 8 production of documents? 9 A. I did so in my capacity as counsel. 10 Q. As counsel for whom? 11 A. As counsel for three of the defendants in 12 this case. 13 Q. So you objected to the production of 14 documents pursuant to a subpoena that was served on 15 you in your capacity as counsel for The Pointe 16 Group, Gerald Freid and Barry Freid? 17 A. And because I didn't want to look through 18 the exact same documents and do a duplicate 19 production of the exact same documents. 20 Q. Did you do what you thought was necessary to 21 insure that any production that you would make 22 pursuant to the subpoena that was served on you 23 would be duplicative of any production made by The 24 Pointe Group?</p>	<p style="text-align: right;">Page 12</p> <p>1 Freid and Georgia Freid? 2 A. I may have glanced at a few things. I did 3 not read those transcripts. I was present at all 4 those depositions. 5 Q. While you were present at any of those three 6 depositions, was there any testimony that was given 7 by any of those witnesses that was inconsistent with 8 your recollection of events? 9 A. I don't remember. There was a lot of 10 testimony. 11 Q. Do you remember, as you sat there attending 12 each of those depositions, having an opinion or a 13 belief as you sat there that something you had just 14 heard was inaccurate or incorrect? 15 A. I'm sure there were, because when people 16 testify honestly, they testify somewhat differently. 17 One of the hallmarks that trial lawyers learn of a 18 made up story is when it's exactly the same. Law 19 enforcement people have the same view of stories 20 that are exactly the same. But I can't identify 21 anything sitting here. 22 Q. Did you consult with counsel or obtain any 23 legal advice in advance of coming to your deposition 24 today?</p>
<p style="text-align: right;">Page 11</p> <p>1 A. I don't understand the question. 2 Q. Okay. When you wrote me this April 4th 3 letter, were you confident that any documents you 4 had in your possession, custody or control that were 5 responsive to the subpoena that was served on you 6 would have been duplicative of documents produced by 7 The Pointe Group, Barry Freid or Gerald Freid? 8 A. I was comfortable, yes. 9 Q. At any time prior to coming here today, did 10 you search through any e-mails that still appear on 11 your computer to see whether you had any e-mails 12 responsive to the subpoena that was served on you? 13 A. I'm not sure how to answer that question. I 14 searched my e-mails in connection with The Pointe 15 Group response and produced all that were not 16 privileged. I don't have two sets of e-mails. 17 Q. Mr. Gordon, did you review any documents in 18 preparation for the deposition? 19 A. I did not. You mean specifically in 20 preparation for my deposition? 21 Q. Yes. 22 A. No. 23 Q. Have you reviewed transcripts of the 24 depositions that were taken of Gerald Freid, Barry</p>	<p style="text-align: right;">Page 13</p> <p>1 A. Well, I thought about it. 2 Q. You thought about doing so? 3 A. No, I thought about the deposition. 4 Q. So just your own thought process? 5 A. Correct. 6 Q. But you didn't obtain any legal advice, 7 other than from yourself? 8 A. That is correct. 9 Q. What is your -- 10 A. I may have had some discussions with Todd 11 Gordon in my office. 12 Q. What is your -- can you just tell me where 13 you went to college, where you went to law school? 14 A. Went to the University of Massachusetts in 15 Amherst. And I went to the Washington College of 16 Law at American University in Washington, D.C. 17 Q. What year did you graduate from law school? 18 A. 1971. 19 Q. Were you admitted to the bar that same year? 20 A. Yes. 21 Q. Was that in Massachusetts? 22 A. Actually first in Maine in August of 1971. 23 Then in November in Massachusetts. 24 Q. Today are you admitted in both Maine and</p>

4 (Pages 10 to 13)

<p style="text-align: right;">Page 14</p> <p>1 Massachusetts?</p> <p>2 A. I am.</p> <p>3 Q. Any other jurisdictions?</p> <p>4 A. I'm a member of the bar in a number of</p> <p>5 federal courts.</p> <p>6 Q. How long have -- the firm that you work for</p> <p>7 or the firm that you are a part of right now is</p> <p>8 Gordon Haley; is that correct?</p> <p>9 A. Yes.</p> <p>10 Q. And at one time it was known at Gordon &</p> <p>11 Wise; is that correct?</p> <p>12 A. That is correct.</p> <p>13 Q. When was that firm formed?</p> <p>14 A. 1987.</p> <p>15 Q. From 1987 to the present, have you practiced</p> <p>16 continuously either at Gordon & Wise or Gordon</p> <p>17 Haley?</p> <p>18 A. It's the same firm with a name change. So</p> <p>19 the answer is from 1987 I've been with the firm I'm</p> <p>20 currently with. Until 2001 it was called Gordon &</p> <p>21 Wise. Since 2001 it's been called Gordon Haley LLP.</p> <p>22 Q. And I believe I saw on some internet site</p> <p>23 that you're certified in bankruptcy law; is that</p> <p>24 right?</p>	<p style="text-align: right;">Page 16</p> <p>1 A. I don't think so.</p> <p>2 Q. Have you ever been named as a defendant in</p> <p>3 any lawsuit?</p> <p>4 A. Yes.</p> <p>5 Q. How many times?</p> <p>6 A. Maybe three or four.</p> <p>7 Q. Did any of those cases arise out of any</p> <p>8 legal advice that you rendered in connection with</p> <p>9 the sale or refinance of a property?</p> <p>10 A. I don't think so.</p> <p>11 Q. Were all those cases in Massachusetts?</p> <p>12 A. I believe so, yes.</p> <p>13 Q. When did that happen most recently, that you</p> <p>14 were named as a defendant in a lawsuit?</p> <p>15 A. This week.</p> <p>16 Q. Where is that case -- where was that case</p> <p>17 filed?</p> <p>18 A. Middlesex Superior Court.</p> <p>19 Q. Who are the plaintiffs?</p> <p>20 A. Plaintiff is Kathy Nathan.</p> <p>21 Q. Is that a former client of yours?</p> <p>22 A. No.</p> <p>23 Q. When did you first meet William Freid?</p> <p>24 A. In 1976.</p>
<p style="text-align: right;">Page 15</p> <p>1 A. That is correct, business bankruptcy law.</p> <p>2 Q. What is the entity through which you have</p> <p>3 that certification?</p> <p>4 A. The American Board of Certification.</p> <p>5 Q. And you said your certification is in</p> <p>6 business bankruptcy?</p> <p>7 A. Yes.</p> <p>8 Q. As opposed to consumer bankruptcy?</p> <p>9 A. Exactly.</p> <p>10 Q. When did you get that certification?</p> <p>11 A. I believe it was 1992.</p> <p>12 Q. Other than business bankruptcies, do you</p> <p>13 have any other areas in which your practice</p> <p>14 specializes?</p> <p>15 A. Civil litigation.</p> <p>16 Q. Have you ever been deposed before?</p> <p>17 A. I have.</p> <p>18 Q. How many different times?</p> <p>19 A. I don't recall. Half a dozen. Could even</p> <p>20 be a dozen.</p> <p>21 Q. Did any of those cases in which you were</p> <p>22 deposed, did any of those cases arise out of the</p> <p>23 non-payment of a broker's fee or any type of</p> <p>24 consultant's fee?</p>	<p style="text-align: right;">Page 17</p> <p>1 Q. Was that a business context or social</p> <p>2 context?</p> <p>3 A. Social.</p> <p>4 Q. How did you meet him?</p> <p>5 A. My wife and I had applied for membership in</p> <p>6 a country club, and he and another person came to</p> <p>7 interview us at our home.</p> <p>8 Q. Did you subsequently become members of that</p> <p>9 country club?</p> <p>10 A. We did.</p> <p>11 Q. And William and Georgia Freid also were</p> <p>12 members?</p> <p>13 A. Yes.</p> <p>14 Q. Were their children also members of the</p> <p>15 country club?</p> <p>16 A. 30 years ago their children were quite</p> <p>17 young. So I'm certain that they were.</p> <p>18 Q. So they were at the country club simply</p> <p>19 because their parents were there?</p> <p>20 A. Correct.</p> <p>21 Q. At any time between 1976 when you first met</p> <p>22 Mr. Freid and the time that Mr. Freid passed away,</p> <p>23 did you ever render any legal services to William</p> <p>24 Freid or Georgia Freid or any of their children?</p>

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<p style="text-align: right;">Page 18</p> <p>1 A. Yes.</p> <p>2 Q. Can you tell me approximately when that was?</p> <p>3 A. Maybe 1998. Maybe 1999. No, wait a minute</p> <p>4 Either 2000 or 2001 I think is probably more</p> <p>5 correct.</p> <p>6 Q. What type of legal services did you render?</p> <p>7 A. Mr. Freid and another man were secured</p> <p>8 creditors in a bankruptcy case.</p> <p>9 Q. Who was the other individual?</p> <p>10 A. Richard Tuch, T-U-C-H.</p> <p>11 Q. Did that bankruptcy matter -- did their</p> <p>12 status as creditors in the bankruptcy matter, did</p> <p>13 that have anything to do with Mr. Freid's</p> <p>14 involvement in any of the nursing home facilities</p> <p>15 that have been the subject of this case?</p> <p>16 A. No.</p> <p>17 Q. How about, other than that representation,</p> <p>18 did you render any other legal services to Mr. and</p> <p>19 Mrs. Freid prior to his passing away?</p> <p>20 A. I believe -- I'm not sure whether my</p> <p>21 engagement with respect to KeyBank preceded or</p> <p>22 followed his death.</p> <p>23 Q. In any event, that's the only other matter</p> <p>24 that you remember providing legal services to them</p>	<p style="text-align: right;">Page 20</p> <p>1 confidentiality of their counsel; and, therefore, I</p> <p>2 don't think I'm entitled to tell you what it is that</p> <p>3 I'm representing them on or have represented them</p> <p>4 on, unless it's a matter of public record. Like,</p> <p>5 for example, my representation of the late Mr. Freid</p> <p>6 in the bankruptcy case.</p> <p>7 Q. In the matter that you're referring to, can</p> <p>8 you tell me who your client is?</p> <p>9 A. No. You gave me a list of people, and the</p> <p>10 client is amongst those people.</p> <p>11 Q. When did the representation begin?</p> <p>12 A. I can't tell you that.</p> <p>13 Q. Is it fair to say -- obviously there's not</p> <p>14 an attorney who's instructing you not to answer. So</p> <p>15 I'm not going to go through the facade of pretending</p> <p>16 that there is. But is it fair to say that you're</p> <p>17 refusing to answer those questions?</p> <p>18 A. Yes. Although, I must say, I don't think</p> <p>19 I'm permitted to answer those questions.</p> <p>20 Q. Well, as I said, it's a little awkward</p> <p>21 because you don't have anyone instructing you not to</p> <p>22 answer. So I'm assuming you're instructing yourself</p> <p>23 not to answer on the grounds of some privilege?</p> <p>24 A. Well, I don't know -- you're right, it is a</p>
<p style="text-align: right;">Page 19</p> <p>1 in connection with?</p> <p>2 A. Yes.</p> <p>3 Q. How about -- obviously we're going to get to</p> <p>4 your representation with respect to KeyBank. But</p> <p>5 other than the representation of the KeyBank</p> <p>6 Financed Entities is how I think they were described</p> <p>7 in The Pointe Group's answer, at any time up to the</p> <p>8 present, have you rendered legal services to either</p> <p>9 Mrs. Freid or the estate or The Pointe Group?</p> <p>10 A. Yes.</p> <p>11 Q. What was that in connection with?</p> <p>12 A. I can't tell you.</p> <p>13 Q. Okay. Can you tell me generally the type of</p> <p>14 legal service that you rendered, even if you're not</p> <p>15 able to identify the exact matter?</p> <p>16 A. Matters involving actual or potential visits</p> <p>17 to courtrooms. I don't handle transactions. I</p> <p>18 don't handle business transactions. I handle</p> <p>19 bankruptcies and matters in courtrooms.</p> <p>20 Q. Is there some reason that you can't tell me</p> <p>21 what type of matter you were rendering apparently</p> <p>22 litigation services to them in connection with? Is</p> <p>23 it some sort of a criminal proceeding?</p> <p>24 A. I think they're entitled to the</p>	<p style="text-align: right;">Page 21</p> <p>1 little awkward with respect to instruction and</p> <p>2 non-instruction. But as a lawyer, I'm obligated to</p> <p>3 keep my clients' confidences. So I'm not permitted</p> <p>4 to answer the question.</p> <p>5 (Exhibit 72 marked for identification.)</p> <p>6 (Document exhibited to witness.)</p> <p>7 Q. Mr. Gordon, I've handed you what's been</p> <p>8 marked as Exhibit 72, the answer in this case. I</p> <p>9 have if you need it, I don't think you will for the</p> <p>10 questions I'm going to ask you, but I do have a copy</p> <p>11 of the complaint as well. If I could just direct</p> <p>12 your attention to paragraph ten of the answer. Just</p> <p>13 so we're on the same page in terms of my questions,</p> <p>14 you see that in this answer, there's terminology</p> <p>15 KeyBank Financed Facilities, and that those are</p> <p>16 identified as Hammond Pointe Nursing Home, LLC,</p> <p>17 Cranberry Pointe Nursing Home, Inc., Boylston Place</p> <p>18 at Chestnut Hill, LLC, and the remaining entities</p> <p>19 that owned the real estate, which would be Cranberry</p> <p>20 Pointe -- I'm sorry, Cranberry Pointe Partnership</p> <p>21 and Chestnut Hill Realty, LLC. Do you see that,</p> <p>22 that terminology is used, the KeyBank Financed</p> <p>23 Facilities are defined as those entities?</p> <p>24 A. I do see that.</p>

6 (Pages 18 to 21)

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1 Q. Now, if I could ask you to turn to paragraph
2 43 of the answer. You see in that paragraph of the
3 answer, the defendants are denying that you involved
4 yourself in the process on behalf of TPG or the
5 Freids; do you see that?

6 A. The process being the solicitation process?

7 Q. Yes.

8 A. I see that.

9 Q. Just a general question. Well, let me ask
10 you this, do you agree with that statement, that you
11 did not involve yourself in the solicitation process
12 on behalf of TPG or the Freids?

13 A. I don't know what solicitation process is
14 being referred to here. Maybe I should take a look
15 at the complaint.

16 Q. Okay.

17 (Document exhibited to witness.)

18 A. I guess I have to go earlier than -- I don't
19 know what solicitation process is being referred to
20 here.

21 Q. Okay. Go as early as you need to.

22 A. If solicitation process means the process of
23 soliciting offers to purchase or prospective
24 refinancing for the Key Financed Entities, I did not

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1 involve myself in that process. And I think that,
2 that statement is correct in paragraph 43 of the
3 answer.

4 Q. Then it goes on to say, further answering,
5 "Defendants state that Gordon," you, "acted only as
6 legal counsel for the KeyBank Financed Facilities
7 and not on behalf of TPG or the Freids." Do you see
8 that?

9 A. Yes.

10 Q. Do you agree with that statement?

11 A. Well, again, let me take a look and see --
12 with respect to the solicitation process, I don't
13 think TPG or the Freids were involved. None of them
14 had anything to sell or refinance. So in connection
15 with the sale or refinance of the KeyBank Financed
16 Facilities, the services would not have been
17 rendered to TPG or the Freids.

18 Q. Okay. Of the KeyBank Financed Facilities as
19 they were defined in paragraph ten, did you
20 represent all of those facilities in connection with
21 the process that we just talked about, the
22 solicitation of refinancing opportunities and offers
23 to buy the premises?

24 A. No.

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1 Q. Let me ask this question. From the time
2 period, September 30, 2003 to September 30, 2004,
3 the date of the closing, did you render legal
4 services to the KeyBank Financed Facilities?

5 A. Yes.

6 Q. What types of legal services did you render?

7 A. I can't tell you that. Well, I can tell you
8 that they were with respect to KeyBank, but I cannot
9 tell you what type they were.

10 Q. Okay. You can't tell me generally what kind
11 of legal services you rendered?

12 A. No.

13 Q. Which of those entities -- to which of those
14 entities did you render legal services?

15 A. All of the KeyBank Financed Facilities.

16 Q. And during that same time period,
17 September 30, 2003 to September 30, 2004, did you
18 render any legal services to The Pointe Group, Inc.
19 in connection with the sale to Epoch of the KeyBank
20 Financed Facilities?

21 A. Point Group, Inc. did not sell anything to
22 Epoch.

23 MS. HIGGINS: Can you have my question
24 read back?

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1 (Question read back.)

2 Q. Can you answer that question?

3 A. I did.

4 Q. All right. Is it fair to say -- this is
5 going to be a long day, Steve, if we have to go
6 through this. That was a yes or no question.

7 A. Then I didn't understand the question, I'm
8 sorry.

9 MS. HIGGINS: Let's read the question
10 back again.

11 (Question reread.)

12 A. I don't understand the question. The Pointe
13 Group did not sell anything to Epoch. I don't
14 understand the question.

15 Q. Okay. So when you were performing legal
16 services during that time period in connection with
17 the sale to Epoch of the KeyBank Financed
18 Facilities, is it true that the only legal services
19 you were rendering were to the KeyBank Financed
20 Facilities?

21 A. I don't know that, that's true. I really
22 don't understand what you're trying to get to. So I
23 don't know what you're trying to accomplish, and I
24 don't know what you're trying to get to. So I don't

<p style="text-align: right;">Page 26</p> <p>1 understand the question.</p> <p>2 Q. Well, let me ask it this way, then. In</p> <p>3 connection with the sale to Epoch of the KeyBank</p> <p>4 Financed Facilities, who did you consider your</p> <p>5 clients to be?</p> <p>6 A. I considered my clients to be the selling</p> <p>7 entities, the entities that had obligations to</p> <p>8 perform ultimately under a purchase and sale</p> <p>9 agreement.</p> <p>10 Q. So you considered your clients to be the</p> <p>11 KeyBank Financed Facilities as they've been defined</p> <p>12 in the answer?</p> <p>13 A. I believe so. I mean, that's the best of my</p> <p>14 belief.</p> <p>15 Q. Did you have an engagement letter or</p> <p>16 retainer letter with the KeyBank Financed</p> <p>17 Facilities?</p> <p>18 A. I don't know.</p> <p>19 Q. If you had a retainer letter or engagement</p> <p>20 letter, would it have been your practice to keep a</p> <p>21 copy of that?</p> <p>22 A. Absolutely.</p> <p>23 Q. During your representation of the KeyBank</p> <p>24 Financed Facilities, to whom -- to which entity or</p>	<p style="text-align: right;">Page 28</p> <p>1 firm provide legal services to the KeyBank Financed</p> <p>2 Facilities?</p> <p>3 A. Yes.</p> <p>4 Q. Which attorneys?</p> <p>5 A. Peter Haley.</p> <p>6 Q. And Mr. Haley's a partner of yours?</p> <p>7 A. Yes. I'm not sure if any associates were</p> <p>8 involved.</p> <p>9 Q. Now, in this litigation, you represent The</p> <p>10 Pointe Group, Inc.; is that correct?</p> <p>11 A. Yes.</p> <p>12 Q. When did that representation begin?</p> <p>13 A. I can't pinpoint it.</p> <p>14 Q. Do you have a retainer letter with The</p> <p>15 Pointe Group, Inc.?</p> <p>16 A. I don't think so, but I may.</p> <p>17 Q. Prior to your representation of The Pointe</p> <p>18 Group, Inc. in this action, have you ever rendered</p> <p>19 any legal services to The Pointe Group, Inc.?</p> <p>20 A. I may have.</p> <p>21 Q. What matters were those legal services in</p> <p>22 connection with?</p> <p>23 A. I don't recall whether The Pointe Group was</p> <p>24 a party to the Chestnut Hill abutter encroachment</p>
<p style="text-align: right;">Page 27</p> <p>1 individual did you send your bills for legal</p> <p>2 services?</p> <p>3 A. At some point I sent them to South Pointe</p> <p>4 Nursing, which was a KeyBank Financed Facility, but</p> <p>5 not one of the ones that are defined in paragraph 43</p> <p>6 of the answer. And at some point I believe I sent</p> <p>7 the bills to The Pointe Group.</p> <p>8 Q. It would be fair to say that you retained</p> <p>9 copies of your bills in your files?</p> <p>10 A. I hope so.</p> <p>11 Q. Did you continue to represent the KeyBank</p> <p>12 Financed Facilities after the closing on September</p> <p>13 30th?</p> <p>14 A. I don't believe so.</p> <p>15 Q. Do you know whether subsequent to the</p> <p>16 September 30, 2004 closing KeyBank loaned any</p> <p>17 additional money to any of those facilities?</p> <p>18 A. I don't know.</p> <p>19 Q. Do you know whether after September 30, 2004</p> <p>20 KeyBank loaned any new monies to any entity with</p> <p>21 which any of the Freid family is affiliated?</p> <p>22 A. I don't know.</p> <p>23 Q. During the period September 30, 2003 to</p> <p>24 September 30, 2004, did any other attorneys at your</p>	<p style="text-align: right;">Page 29</p> <p>1 litigation. And I don't know if The Pointe Group is</p> <p>2 specifically involved in the attorney general's</p> <p>3 investigation of Cranberry Pointe. But those would</p> <p>4 be the only matters in connection with this</p> <p>5 transaction.</p> <p>6 Q. When did you first become aware of the</p> <p>7 Chestnut Hill abutter litigation?</p> <p>8 A. When Andy Sucoff from Goodwin Procter called</p> <p>9 me not too much prior to the closing. Maybe three</p> <p>10 weeks, maybe four weeks.</p> <p>11 Q. Now, in this litigation you also represent</p> <p>12 Gerald Freid and Barry Freid; is that correct?</p> <p>13 A. Yes.</p> <p>14 Q. And prior to representing those two</p> <p>15 individuals in this action, did you ever represent</p> <p>16 them prior to that?</p> <p>17 A. I don't believe so. Let me -- one or both</p> <p>18 of them may have been participants in the loans that</p> <p>19 I represented their late father in.</p> <p>20 Q. Are you referring to the bankruptcy</p> <p>21 proceeding?</p> <p>22 A. Yes.</p> <p>23 Q. Now, you also represented Georgia Freid at</p> <p>24 her deposition, correct?</p>

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1 A. Yes.

2 Q. Whom did you bill for the time that you
3 spent defending that deposition?

4 A. I can't tell you that.

5 Q. And you represented Mr. McCullough at his
6 deposition?

7 A. Yes.

8 Q. Who did you bill for the time you spent
9 defending that deposition?

10 A. I can't tell you that.

11 Q. You represented Frank Barker in his capacity
12 as keeper of the records at Chestnut Hill Lifecare?

13 A. Yes.

14 Q. Who did you bill for the time representing
15 that deposition?

16 A. I can't tell you.

17 Q. Who do you intend to bill for the time
18 you're spending at deposition here today?

19 A. I can't tell you.

20 Q. Prior to your representation of the KeyBank
21 Financed Facilities, have you ever -- did you ever
22 work on a deal in which Casas, Benjamin & White was
23 involved in any way?

24 A. Not to my memory.

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1 Q. So when you first were brought in to
2 represent the KeyBank Financed Facilities, was that
3 the first time you had ever heard of Casas, Benjamin
4 & White?

5 A. No.

6 Q. How would you have heard of Casas, Benjamin
7 & White prior to that?

8 A. It wasn't prior to that. It was well
9 subsequent to that.

10 Q. When you first learned that Casas, Benjamin
11 & White had some role in connection with the
12 transaction, the sale to Epoch of the KeyBank
13 Financed Facilities, was that the first time you had
14 ever heard of Casas, Benjamin & White?

15 A. I believe so, yes. May have been just prior
16 to the time when they were engaged. Although I
17 didn't see a copy of their engagement letter. So I
18 don't know when I first heard of Casas, Benjamin &
19 White. But I do not believe, in answer to your
20 question, that I had ever heard of Casas, Benjamin &
21 White in any way outside of this particular matter.

22 Q. Okay. How about before your involvement in
23 this particular matter, had you ever been involved
24 in a deal on which KeyBank was either the lender or

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1 was providing financing?

2 A. Yes.

3 Q. Do you remember which offices you had worked
4 with?

5 A. I didn't work with offices. It was a
6 litigation matter.

7 Q. What type of a litigation matter was that?

8 Were you representing KeyBank or were you --

9 A. No, I wasn't representing KeyBank. It was I
10 guess what you would call lender liability suit.
11 For some reason, I'm never around when the money is
12 being lent.

13 Q. In that, for lack of a better term, the
14 lender liability suit, do you remember whether
15 either Steve Dunham or Madeline Kauffman were
16 involved in that at all?

17 A. I'm quite certain they were not.

18 Q. Mr. Gordon, I'm handing you what was
19 previously marked as Exhibit 4.

20 (Document exhibited to witness.)

21 Q. Mr. Gordon, do you recognize this document
22 as being a copy of the engagement letter between
23 Casas, Benjamin & White and an entity that's
24 described here as The Pointe Group Health Care and

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1 Senior Living?

2 A. Yes.

3 Q. Do you recall when you first saw this?

4 A. I don't recall exactly. I believe it was
5 sometime in the spring. I think perhaps late spring
6 of 2004.

7 Q. Do you recall how it came to be in your
8 possession?

9 A. I don't.

10 Q. Do you recall reading it when you first saw
11 it?

12 A. I don't recall reading it when I first saw
13 it, but I may very well have.

14 Q. Okay.

15 MS. HIGGINS: Let's mark this.

16 (Exhibit 73 marked for identification.)

17 (Document exhibited to witness.)

18 Q. Mr. Gordon, the court reporter has just
19 handed you what's been marked as Exhibit 73. Do you
20 recognize this to be an e-mail printed from the
21 system at your office?

22 A. I do.

23 Q. Is this an e-mail -- strike that.

24 The e-mail that's on the bottom half is

<p style="text-align: right;">Page 34</p> <p>1 an e-mail from you to Matt Caine on May 27, 2004</p> <p>2 indicating that you had left a voice mail for Matt</p> <p>3 asking him to send you an executed copy of your</p> <p>4 firm's, CBW's commission agreement with The Pointe</p> <p>5 Group; do you see that?</p> <p>6 A. Yes.</p> <p>7 Q. Then it looks like you're forwarding this</p> <p>8 e-mail to Madeline Kauffman, correct?</p> <p>9 A. Yes.</p> <p>10 Q. Is that roughly consistent with your memory</p> <p>11 that you first saw a copy of the engagement letter</p> <p>12 in the spring of 2004?</p> <p>13 A. Yes, based on the assumption that in</p> <p>14 response to this e-mail, Matt Caine did fax or</p> <p>15 e-mail a copy of the commission agreement.</p> <p>16 Q. Having reviewed Exhibit 73, do you now</p> <p>17 recall why you asked Mr. Caine to send you a copy of</p> <p>18 the commission agreement?</p> <p>19 A. Yes, the second sentence of the e-mail</p> <p>20 actually so states.</p> <p>21 Q. Okay. Why did you ask for this agreement?</p> <p>22 A. So that I could include the commission</p> <p>23 payable in the agreement with KeyBank.</p> <p>24 MS. HIGGINS: Mark that as the next</p>	<p style="text-align: right;">Page 36</p> <p>1 Q. You see that this is directed to the board</p> <p>2 of directors, The Pointe Group Health Care and</p> <p>3 Senior Living; do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. When you saw this engagement letter, had you</p> <p>6 ever seen an entity or seen that name, The Pointe</p> <p>7 Group Health Care and Senior Living?</p> <p>8 A. I'm not sure I focused on that at all.</p> <p>9 Q. Regardless of whether you focused on it or</p> <p>10 not, at the time period that you asked for this</p> <p>11 engagement letter, May of 2004, had you at that time</p> <p>12 ever seen The Pointe Group Health Care and Senior</p> <p>13 Living referred to on any documents, anything like</p> <p>14 that?</p> <p>15 A. Well, The Pointe Group has a letterhead or</p> <p>16 had a letterhead, I don't know if they still do, in</p> <p>17 which I guess they describe the business that</p> <p>18 they're in as health care and senior living, just</p> <p>19 like I think my letterhead says counselors at law.</p> <p>20 So I'm sure I had seen that letterhead.</p> <p>21 Q. Did you at any time after you got this --</p> <p>22 you received a copy of this engagement letter, from</p> <p>23 that point forward to the closing, did you ever</p> <p>24 discuss with CBW that this entity, The Pointe Group</p>
<p style="text-align: right;">Page 35</p> <p>1 exhibit.</p> <p>2 (Exhibit 74 marked for identification.)</p> <p>3 (Document exhibited to witness.)</p> <p>4 Q. Mr. Gordon, Exhibit 74 is also a printout of</p> <p>5 an e-mail from your computer system?</p> <p>6 A. Yes.</p> <p>7 Q. You see at the bottom there is a printed out</p> <p>8 e-mail from Matt Ryan at Casas, Benjamin & White to</p> <p>9 you with a CC to Matt Caine, which says that he is</p> <p>10 attaching a copy of the -- attaching the executed</p> <p>11 engagement letter between The Pointe Group and CBW?</p> <p>12 A. Yes.</p> <p>13 Q. And that you then sent an e-mail to Madeline</p> <p>14 Kauffman attaching that agreement?</p> <p>15 A. That's the top e-mail, yes.</p> <p>16 Q. And in that e-mail you also make a</p> <p>17 calculation as to the amount that would be due to</p> <p>18 CBW on a 37 million dollar sale?</p> <p>19 A. Yes, there's a calculation of a commission.</p> <p>20 Q. That's a calculation that you did?</p> <p>21 A. I believe so.</p> <p>22 Q. Getting back to Exhibit 4, which is the</p> <p>23 engagement letter.</p> <p>24 A. Yes.</p>	<p style="text-align: right;">Page 37</p> <p>1 Health Care and Senior Living, or at least as that's</p> <p>2 identified here, was not a legal entity?</p> <p>3 A. No.</p> <p>4 Q. When you first received this letter, would</p> <p>5 you agree with me that based on the e-mail that you</p> <p>6 sent to Madeline Kauffman, you at least read parts</p> <p>7 of the letter when you received it, correct?</p> <p>8 A. Yes.</p> <p>9 Q. When you first received and reviewed this</p> <p>10 letter, at that time did you form any opinion that</p> <p>11 this agreement was unenforceable in terms of any</p> <p>12 amount that was payable to CBW, because the</p> <p>13 agreement identified the other party to the</p> <p>14 agreement as The Pointe Group Health Care and Senior</p> <p>15 Living?</p> <p>16 A. I can't answer that question.</p> <p>17 Q. At the time you first received and reviewed</p> <p>18 this agreement, did you form any opinion that the</p> <p>19 contract was unenforceable in terms of any payments</p> <p>20 due to CBW because the contract had been made with</p> <p>21 an entity that was not an entity that had an</p> <p>22 ownership interest in any of the KeyBank Financed</p> <p>23 Facilities?</p> <p>24 A. I can't answer that question.</p>

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1 Q. At the time you first received and reviewed
2 this agreement, was it your belief that if a
3 transaction was consummated as described in the
4 agreement, that The Pointe Group would owe some
5 amount to CBW?

6 A. I can't answer that question.

7 Q. At the time you first received and reviewed
8 this agreement, did you have discussions with
9 anyone, without telling me what the substance of
10 those discussions were, as to whether or not The
11 Pointe Group had an enforceable obligation to pay
12 CBW a fee if the conditions of the engagement letter
13 were met?

14 A. I can't answer that question.

15 Q. From the time you first received and
16 reviewed the engagement letter through the date of
17 the closing on September 30, 2004, did you ever have
18 a discussion with anyone, other than those
19 individuals who you consider to be your clients, as
20 to whether or not there was an enforceable
21 obligation under this agreement to pay CBW?

22 A. I don't believe so. By "the closing," you
23 mean September 30, 2004?

24 Q. Correct.

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1 A. And by the time I left that closing?

2 Q. Correct. From the time you first received
3 and reviewed this agreement through the date of the
4 closing, did you have any discussions with John
5 McCullough as to whether or not there was an
6 enforceable obligation to pay Casas, Benjamin &
7 White under the terms of this agreement?

8 A. I can't answer that.

9 Q. Between the date that you first received and
10 reviewed this letter and the date of the closing,
11 September 30, 2004, did you have any discussions
12 with Gerald Freid as to whether or not there was an
13 enforceable obligation to pay Casas, Benjamin &
14 White under this agreement?

15 A. I can't answer that.

16 Q. Did you have any such discussions during the
17 time period I've just referenced with Barry Freid?

18 A. I can't answer that.

19 Q. Did you have any such discussions during the
20 time period I just referenced with Mark Tobin?

21 A. I can't answer that.

22 Q. Did you have any discussions, such
23 discussions during that time period I just mentioned
24 with Frank Barker?

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1 A. I can't answer that.

2 Q. Prior to your representation of the KeyBank
3 Financed Facilities, had you ever been retained in
4 connection with the sale of a business or the
5 refinancing of a business in which the selling
6 entity or the ownership entity was utilizing the
7 services of an investment banking company like
8 Casas, Benjamin & White?

9 A. I don't know. I would think so, but I don't
10 know.

11 Q. Can you remember any such instance as you
12 sit here today?

13 A. I can't. Again, I'm not a transactional
14 lawyer, but I'm sure I've been involved in sales or
15 refinancings where there were -- you said investment
16 bankers?

17 Q. Correct.

18 A. Where there were investment bankers, but I
19 guess I can't be sure, and I certainly can't name
20 any.

21 Q. Leaving aside this particular litigation, do
22 you recall any instance prior to today where you
23 took a position on behalf of a client that a
24 consultant wasn't entitled to a fee upon the sale of

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1 a business because the consultant wasn't a licensed
2 real estate broker in Massachusetts?

3 A. I don't believe so.

4 Q. If you could look, Mr. Gordon, at the
5 third -- section two of the engagement, and you'll
6 see that's titled fee arrangements. And there's a
7 first page that says restructuring services. And
8 then the next page, the next underlined paragraph
9 says investment banking services. Is that the
10 paragraph that you reviewed in connection with
11 preparing your e-mail to Madeline Kauffman that
12 we've just marked as Exhibit 74 regarding a
13 calculation of the performance incentive payments as
14 they're defined in that paragraph to CBW?

15 A. My e-mail says commission.

16 Q. Is that the paragraph that you looked at in
17 reaching the figure that you have here of 1,250
18 thousand dollars?

19 A. I believe so, yes.

20 Q. And you'd agree with me that, that paragraph
21 refers to CBW's entitlement to performance incentive
22 payments? Do you see that language?

23 A. I do see that.

24 Q. And you also see, if you look about halfway

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<p style="text-align: right;">Page 42</p> <p>1 down, there's a definition of transaction value 2 where it says, "Transaction value shall mean the sum 3 of the gross sale proceeds." Then it goes on from 4 there. Do you see that? 5 A. Yes. 6 Q. Then if you go further down in that same 7 paragraph, do you see where it says, "The 8 performance incentive payments shall be due and 9 payable at the closing of each transaction"? Do you 10 see that? 11 A. I see that. 12 Q. And you had reviewed this language, at least 13 the paragraph pertaining to these fees, when you 14 wrote this e-mail to Madeline Kauffman on May 27th, 15 correct? 16 A. I'm not sure what I did on May 27th. 17 Obviously I read the percentages to come up with a 18 commission amount that's in the May 27th e-mail. 19 Q. Okay. So what you're saying is that you're 20 confident that you read part of the paragraph, but 21 you're not sure that you read all of it? 22 A. That's correct. 23 Q. Mr. Gordon, when did you first form an 24 opinion that CBW was not entitled to the full amount</p>	<p style="text-align: right;">Page 44</p> <p>1 Was that a discussion that you had with 2 Mr. Casas on the telephone or was that in writing? 3 A. Both. I had sent him a letter, and then we 4 had subsequent telephone conversations, I believe. 5 I know we had prior telephone conversations or a 6 prior telephone conversation on October 1st, which I 7 believe was non-substantive. I simply asked him to 8 wait for my letter. I then e-mailed him my letter, 9 and I believe that we had at least one telephone 10 conversation after that, although it might have been 11 with his counsel. I'm not sure. 12 Q. At the time that you wrote your letter, 13 which you sent to Mr. Casas by e-mail, did you 14 believe that you had authority from your client to 15 convey that position to Mr. Casas? 16 A. I can't answer that. 17 Q. Prior to raising with Mr. Casas the argument 18 the CBW was not entitled to the performance 19 incentive payments because it was not a licensed 20 real estate broker in Massachusetts, had you had 21 discussions about that issue with anyone else? 22 A. I can't answer that. 23 Q. Prior to raising that issue with Mr. Casas, 24 had you had discussions about that issue with</p>
<p style="text-align: right;">Page 43</p> <p>1 of the performance incentive payments as identified 2 in this paragraph? 3 A. I can't answer that. 4 Q. Did you ever discuss that opinion with 5 anyone prior to September 30, 2004? 6 A. I can't answer that. 7 Q. When did you first discuss that opinion with 8 any other person? 9 A. After September 30th. Either on or after 10 September 30th. 11 Q. With whom did you first discuss that 12 opinion? 13 A. I can't answer. 14 Q. In connection with the first discussion that 15 you had with anyone regarding that opinion, who was 16 present for that discussion? 17 A. I don't remember who was present. 18 Q. When did you first discuss that opinion with 19 anyone other than an individual whom you considered 20 to be your client? 21 A. October 1st. 22 Q. And who was that? 23 A. I believe it was Ed Casas. 24 Q. At the time you had that -- strike that.</p>	<p style="text-align: right;">Page 45</p> <p>1 anyone, other than someone who you considered to be 2 your client? 3 A. Or co-counsel. 4 Q. Are you adding to my question? 5 A. Well, if I can't add to your question, I 6 have to refuse to answer it. I can't answer it. If 7 you exclude -- if by your question you're trying to 8 exclude people to whom the privilege would apply, I 9 can answer that question. 10 Q. Okay. Well, let's do it both ways. Prior 11 to having those communications with Mr. Casas, had 12 you discussed that issue with co-counsel? 13 A. I can't answer that. 14 Q. In connection with your retention by the 15 KeyBank Financed Facilities, whom did you consider 16 your co-counsel to be? 17 A. John McCullough. 18 Q. And -- let me go back, then. Prior to 19 having those communications with Ed Casas in which 20 you took the position that CBW wasn't entitled to 21 the full amount of the performance incentive 22 payments because CBW was not a licensed real estate 23 broker in Massachusetts, had you had discussions 24 about that issue with anyone, other than</p>

<p style="text-align: right;">Page 46</p> <p>1 Mr. McCullough or individuals whom you considered to</p> <p>2 be your clients?</p> <p>3 A. I don't believe so.</p> <p>4 Q. Before those communications with Mr. Casas,</p> <p>5 just to be clear, had you ever raised with CBW --</p> <p>6 had you ever had any discussions with CBW as to</p> <p>7 whether or not CBW had a license to sell real estate</p> <p>8 in Massachusetts?</p> <p>9 A. I don't believe so.</p> <p>10 Q. Prior to those communications with</p> <p>11 Mr. Casas, were you ever present on any occasions</p> <p>12 where that issue was discussed by anyone else in</p> <p>13 your presence?</p> <p>14 A. I don't think so.</p> <p>15 Q. Did you ever hear CBW represent that it had</p> <p>16 such a license?</p> <p>17 A. Not to my recollection.</p> <p>18 Q. If the fact finder in this case or the court</p> <p>19 ultimately determines that CBW is entitled to the</p> <p>20 full amount of the performance incentive payments</p> <p>21 specified in that paragraph of the engagement</p> <p>22 letter, which entity or individual do you believe is</p> <p>23 liable for those payments?</p> <p>24 A. I'm here as a fact witness.</p>	<p style="text-align: right;">Page 48</p> <p>1 be liable for any payment to CBW.</p> <p>2 Q. What was Mr. O'Connell's response?</p> <p>3 A. He disagreed.</p> <p>4 Q. Did Mr. O'Connell offer any further</p> <p>5 statement as to who he thought was liable for the</p> <p>6 payments?</p> <p>7 A. I don't recall. I don't recall him agreeing</p> <p>8 that there was liability. He certainly disagreed</p> <p>9 that his client was liable.</p> <p>10 Q. Other than Mr. O'Connell, have you ever had</p> <p>11 a discussion with anyone whom you don't consider to</p> <p>12 be your client on the issue of if the payments are</p> <p>13 due, who's liable to make the payments?</p> <p>14 A. Yes.</p> <p>15 Q. Who was that?</p> <p>16 A. Tom Peisch, yourself and Mike Bernard.</p> <p>17 Q. Anyone other than those individuals?</p> <p>18 A. Outside of privileged communications?</p> <p>19 Q. Well, communications you consider to be</p> <p>20 privileged.</p> <p>21 A. Judge Laska.</p> <p>22 Q. Anyone else?</p> <p>23 A. I can't think of anyone else.</p> <p>24 Q. Who are the individuals to whom you believe</p>
<p style="text-align: right;">Page 47</p> <p>1 Q. So you're not going to answer that question?</p> <p>2 A. I'm not going to give you legal advice,</p> <p>3 Erin.</p> <p>4 Q. I'm not asking you for legal advice.</p> <p>5 A. Yes, you are.</p> <p>6 Q. I'm not asking you if your opinion is right</p> <p>7 or wrong. I'm asking you what your belief is.</p> <p>8 A. My opinion is, I'm here as a fact witness.</p> <p>9 Not an opinion witness.</p> <p>10 Q. So you're not answering that question?</p> <p>11 A. I'm here as a fact witness.</p> <p>12 Q. Prior to today, have you ever discussed that</p> <p>13 issue, the issue of who would be liable for the</p> <p>14 payments, if the payments are in fact due? Have you</p> <p>15 ever discussed that issue with anyone, other than</p> <p>16 those individuals whom you consider to be your</p> <p>17 clients?</p> <p>18 A. Yes.</p> <p>19 Q. Who was that?</p> <p>20 A. Scott O'Connell.</p> <p>21 Q. What were the discussions? Relate to me the</p> <p>22 discussions that you had on that issue with</p> <p>23 Mr. O'Connell.</p> <p>24 A. I told him that I thought that KeyBank would</p>	<p style="text-align: right;">Page 49</p> <p>1 the privilege runs in connection with your having</p> <p>2 provided legal services to the KeyBank -- let me ask</p> <p>3 the question this way.</p> <p>4 Who are the individuals to whom you</p> <p>5 believe the privilege runs in connection with</p> <p>6 communications that were made during the time period</p> <p>7 September 30, 2003 to October 1, 2004?</p> <p>8 A. Anyone employed by or involved in an</p> <p>9 ownership or management capacity with any of the</p> <p>10 KeyBank Financed Facilities, The Pointe Group, Gerry</p> <p>11 Freid, Barry Freid.</p> <p>12 Q. So let me try to break that down a little</p> <p>13 bit. Anyone employed by any of the KeyBank Financed</p> <p>14 Facilities; is that correct?</p> <p>15 A. Anyone employed, other than a -- yes, I</p> <p>16 believe anyone employed by them.</p> <p>17 Q. So anyone employed by any of the KeyBank</p> <p>18 Financed Facilities. Then you also said, I believe,</p> <p>19 I don't want to misstate your testimony, The Pointe</p> <p>20 Group, Inc.?</p> <p>21 A. Yes.</p> <p>22 Q. What is the basis for your taking the</p> <p>23 position that there's a privilege that runs -- let</p> <p>24 me ask this other question first. Is it your</p>

<p style="text-align: right;">Page 50</p> <p>1 position that communications you had with employees 2 of The Pointe Group, Inc. during the time period 3 September 30, 2003 to September 30 -- October 1, 4 2004, that all those communications are privileged? 5 A. Well, not all those communications would be 6 privileged. Those communications involving 7 attorney/client relationships and communications are 8 privileged. 9 Q. With employees of The Pointe Group, Inc.? 10 A. Yes. 11 Q. And I believe you also said Barry Freid; is 12 that correct? 13 A. Yes. 14 Q. And is it your position that you have a 15 privilege with Barry Freid because Barry Freid was 16 in some way associated with one of those entities? 17 A. You're asking for my legal opinion again. 18 I'm here as a fact witness. Not to give you my -- 19 not to give you testimony with respect to law. 20 Q. Well, during the time period September 30, 21 2003 to September 30, 2004, did you represent Barry 22 Freid in his individual capacity? 23 A. I can't answer that. 24 Q. During that same time period, did you</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. During that same time period, September 30, 2 2003 to September 30, 2004, I believe it was your 3 earlier testimony that you did not represent The 4 Pointe Group, Inc. in connection with the sale to 5 Epoch of the KeyBank Financed Facilities, correct? 6 A. I can't -- I don't know how to answer that 7 question. 8 Q. Did you not know who your clients were? 9 A. Do you not know who the sellers were? 10 Q. Well, I just want to -- 11 A. My understanding is -- again, I'm not a 12 transactional lawyer, but my understanding is that 13 The Pointe Group is not a party to the transaction. 14 Q. Yet you're claiming a privilege applies to 15 communications that you had with employees of The 16 Pointe Group, Inc.? 17 A. Yes. 18 MS. HIGGINS: Let's mark this as the 19 next exhibit. 20 (Exhibit 75 marked for identification.) 21 (Document exhibited to witness.) 22 Q. Mr. Gordon, you see that the top -- starting 23 with the bottom e-mail that there's an e-mail from 24 Matt Caine to various individuals, including you, on</p>
<p style="text-align: right;">Page 51</p> <p>1 represent Gerald Freid in his individual capacity? 2 A. I can't answer that. 3 Q. Let me just try a further question to make 4 sure we don't misunderstand each other. During that 5 time period I specified, did you represent Barry 6 Freid in his individual capacity in connection with 7 the sale to Epoch of the KeyBank Financed 8 Facilities? 9 A. I don't believe so. 10 Q. Same question, during the time period 11 September 30, 2003 to September 30, 2004, did you 12 represent Gerald Freid in his individual capacity in 13 connection with the sale to Epoch of the KeyBank 14 Financed Facilities? 15 A. I don't believe so. But, again, entities 16 speak only through human beings. Among the human 17 beings that spoke on behalf of the entities and 18 obviously communicated with counsel were Barry and 19 Gerry Freid. 20 Q. But my question was directed to the 21 representation of them in their individual 22 capacities, not as officers and employees. 23 A. And I answered that, that I did not believe 24 so.</p>	<p style="text-align: right;">Page 53</p> <p>1 April 26th of 2004. Do you see that? 2 A. At the top? 3 Q. At the bottom, sorry. 4 A. Yes, I see that. 5 Q. And Mr. Caine is forwarding to the various 6 recipients of the e-mail a proposed form e-mail that 7 CBW intends to send out to all interested parties. 8 Do you see that? 9 A. Yes, I do. 10 Q. Do you recall if -- I'll just state for the 11 record that in terms of what we've reviewed, this 12 seems to be the first communication on which you 13 were copied in connection with this transaction. My 14 question for you is whether, you know, do you 15 remember having an involvement in the sale to Epoch, 16 what ultimately resulted in the sale to Epoch prior 17 to late April of 2004? 18 A. I was certainly involved with respect to 19 KeyBank prior to that time. So, I don't know if 20 that answers your question. 21 Q. Okay. When you were -- when you say you 22 were involved with KeyBank prior to late April of 23 2004, were you having communications with KeyBank? 24 A. I think so.</p>

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1 Q. Were those communications in the form of
2 e-mails, faxes?

3 A. Maybe.

4 Q. What were the communications regarding?

5 A. They were regarding the lending relationship
6 between the KeyBank Financed Facilities and KeyBank.

7 Q. Prior to the time that Epoch was identified
8 as the party with whom negotiations were going to
9 move forward, what types of -- what type of
10 negotiation was going on with KeyBank?

11 A. We were negotiating extensions in
12 forbearance agreements.

13 Q. Who were you dealing with at KeyBank in
14 connection with those?

15 A. I believe it was always Madeline Kauffman.

16 Q. In response to this April 26, 2004 e-mail
17 from Matt Caine, you sent an e-mail back to Matt
18 Caine and others dated April 27, 2004. Do you see
19 that?

20 A. I do.

21 Q. And you begin by saying, "The Pointe Group
22 has nothing for sale," correct?

23 A. That's what it says.

24 Q. You then go on to say about halfway down,

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1 "And I think it's important for The Pointe Group,
2 which has other interests not for sale, not to give
3 the impression internally or externally that
4 everything they have is for sale." My question is,
5 what were the other interests that The Pointe Group
6 had when you wrote this e-mail that were not for
7 sale?

8 A. Management contracts with other facilities.

9 Q. Those were with which facilities?

10 A. I don't recall. I think there are three
11 such facilities. It might be four.

12 Q. Did you ever have any communications with
13 Kelly White of Casas, Benjamin & White?

14 A. I don't think so.

15 Q. Prior to the closing on September 30, 2004,
16 had you ever discussed with anyone at CBW any issues
17 pertaining to Kelly White's departure from CBW?

18 A. I have no memory of having done that.

19 Q. Did you ever discuss that prior to the
20 closing with anyone from KeyBank?

21 A. I have no memory of having done that, no.

22 Q. So with respect to either KeyBank or CBW,
23 you don't remember ever having conveyed to either of
24 those entities that your clients had concerns about

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1 the fact that Kelly White was no longer working on
2 the deal?

3 A. That's correct.

4 Q. In terms of, if you look back at Exhibit 4,
5 the engagement letter, and you see that there is a,
6 in paragraph one, background and scope of services,
7 it first refers to certain restructuring services
8 that Casas, Benjamin & White is going to provide.
9 It starts on the bottom of that first page and goes
10 on to the next page.

11 A. I see that, yes.

12 Q. Do you have any personal knowledge as to
13 whether or not CBW performed the restructuring
14 services described in the agreement?

15 A. I don't know if I've ever seen the
16 restructuring work plan, which is described as
17 exhibit A. So I'm not sure I can answer that
18 question.

19 Q. Okay. Well, my question was whether you had
20 any knowledge, personal knowledge as to whether or
21 not CBW performed the restructuring services that
22 are described in the agreement?

23 A. I don't know.

24 Q. Would it be fair to say, then, that you

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1 don't have any personal knowledge as to the quality
2 of the services -- of those restructuring services
3 as they were provided by CBW?

4 A. Yes.

5 Q. You see that the agreement then goes on to
6 talk on page 2 about certain investment banking
7 services that CBW will provide.

8 A. Yes, I see that.

9 Q. Based on documents that you received during
10 the relevant time period, would you agree with me
11 that CBW -- strike that for one second.

12 You see that in the first full paragraph
13 on the top of page 2 where it talks about the
14 investment banking services, it says, "The
15 investment banking services that CBW will provide
16 include the following: CBW will use all reasonable
17 efforts to accomplish on behalf of PGHS, which CBW
18 is using to refer to Pointe Group Health Care and
19 Senior Living, and its stockholders, the
20 consummation of a transaction or series of
21 transactions involving the Cranberry Pointe and
22 Chestnut Hill facilities." Did you ever advise CBW
23 that the stockholders of either The Pointe Group,
24 Inc. or The Pointe Group Health Care and Senior

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<p style="text-align: right;">Page 58</p> <p>1 Living did not have an ownership interest in any of 2 the facilities that were being marketed by CBW? 3 A. Yes. 4 Q. When did that happen? 5 A. At least on April 27, 2004 in Exhibit 65. 6 Q. Did you have any specific discussions with 7 anyone at CBW as to who the stockholders of The 8 Pointe Group, Inc. were during that time period of 9 September 30, 2003 to 2004? 10 A. I don't think so. 11 Q. Did you have any discussions with anyone at 12 CBW as to who had ownership interest in the selling 13 entities? 14 A. I don't think so. 15 Q. If you see at the bottom there, sub 16 paragraph C, well the initial -- the introductory 17 phrases at the top, "In pursuit of the transaction, 18 CBW shall provide the following." Then in sub 19 paragraph C it says, "Identifying and contacting and 20 introducing potential purchasers for all or part of 21 the business as well as capital sources to provide 22 debt financing, including those which have contacted 23 you." Do you see that language in the agreement? 24 A. I do.</p>	<p style="text-align: right;">Page 60</p> <p>1 Q. Do you remember that Epoch's indication of 2 interest was at the highest range? 3 A. Yes. 4 Q. And you'd agree with me that Epoch was 5 introduced to the <u>selling entities by CBW</u>? 6 A. I don't know that. 7 Q. <u>Do you have any information to suggest</u> 8 <u>otherwise?</u> 9 A. I do not. 10 Q. <u>Would you agree with me that Barry Freid and</u> 11 <u>Gerald Freid were the individuals who made the</u> 12 <u>decision as to which parties to invite for</u> 13 <u>management presentations?</u> 14 A. I don't know. 15 Q. Were you present at the management 16 presentations? 17 A. I don't think so. I don't know what a 18 management presentation is. 19 Q. Were you present at meetings where 20 interested buyers or lenders toured the facilities 21 and met with management of the different facilities? 22 A. No. 23 (Exhibit 76 marked for identification.) 24 (Document exhibited to witness.)</p>
<p style="text-align: right;">Page 59</p> <p>1 Q. Would you agree with me that CBW, in pursuit 2 of the transaction, identified and sent initial 3 information about the facilities to 88 different 4 parties, including 12 lenders? 5 A. I don't know. 6 Q. Would you agree with me that CBW thereafter 7 distributed the confidential information memoranda 8 to 31 parties, including five lenders? 9 A. I don't know that. 10 Q. Do you recall reviewing the confidential 11 information memorandum that CBW sent out? 12 A. I don't have a memory of having done so. I 13 may have, but I don't have a memory of having done 14 so. 15 Q. Would you agree with me that some of the 16 interested lenders refused to move forward with the 17 process after Gerry Freid and Barry Freid refused to 18 provide personal financial statements? 19 A. I have no knowledge of that. 20 Q. Would you agree with me that by March 19th 21 of 2004, CBW had received indications of interest 22 from 12 parties, including four lenders? 23 A. I don't know the exact number, but I 24 remember that there was interest.</p>	<p style="text-align: right;">Page 61</p> <p>1 (Exhibit 77 marked for identification.) 2 (Document exhibited to witness.) 3 Q. Mr. Gordon, Exhibit 76 you'll see, would you 4 agree with me that this page appears to be a 5 printout from your computer system? 6 A. Yes. 7 Q. And you see at the bottom, the bottom half 8 consists of a message from Matt Ryan on May 4, 2004 9 to Barry Freid, Gerry Freid and others, including 10 you, that says, "Barry and Gerry, attached please 11 find the TPG solicitation update, which includes a 12 summary of all letters of intent that we received on 13 Friday, April 30, 2004." Do you see that? 14 A. I do. 15 Q. If you look at Exhibit 77, which is this 16 larger document, do you recall receiving -- well, 17 let me ask you this question first. You recall 18 receiving this e-mail, is that right, the one marked 19 as Exhibit 76? 20 A. I don't have a specific memory of it, but 21 I'm sure I received it, and I responded to it, 22 apparently. 23 Q. Do you recall receiving from CBW a document 24 that summarized the letters of intent that had been</p>

16 (Pages 58 to 61)

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1 received?

2 A. Yes.

3 Q. Do you recognize Exhibit 77 to be that
4 document?

5 A. Well, I haven't gone through it page by
6 page, but I believe it is.

7 Q. And you say in response to Mr. Ryan's
8 message, "Matt, I will have Georgia, Barry and Gerry
9 Freid and Frank Barker on the 11 o'clock with me."
10 Do you see that?

11 A. Yes.

12 Q. Do you recall that conference call actually
13 took place?

14 A. I believe it did.

15 Q. Do you remember where you were when the call
16 took place?

17 A. I was in my office.

18 Q. Do you recall if the individuals you've
19 identified, Georgia, Barry, Gerry Freid and Frank
20 Barker, were also in your office?

21 A. They were not.

22 Q. Do you recall whether there were other
23 individuals on that call, other than Georgia, Barry
24 and Gerry Freid and Frank Barker?

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1 A. And the CBW people?

2 Q. Right, and you.

3 A. I don't recall.

4 Q. You see that in Mr. Ryan's e-mail message,
5 the second paragraph, he talks about the call, and
6 he says, "We would like to have a call on Wednesday
7 at 11 a.m. eastern standard time with all TPG
8 shareholders to discuss the letters and the time."
9 Do you see that?

10 A. Yes.

11 Q. Did you ever say to Mr. Ryan, "Well, the TPG
12 shareholders have nothing to do with this"?

13 A. I don't recall saying that.

14 Q. If you look at the document marked as
15 Exhibit 77, which has a title page that says
16 confidential presentation, May 5, 2004, and then I
17 don't -- there are page numbers. Page four starts
18 the solicitation update. And page six has a summary
19 of the letters of intent that had been received.

20 A. Yes.

21 Q. Looking at that schedule, is that consistent
22 with your memory that there were a number of offers
23 to buy both facilities?

24 A. Yes.

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1 Q. Is this schedule also consistent with your
2 memory that there were some offers to buy only the
3 Chestnut Hill facility?

4 A. I don't have a specific memory of that, but
5 I have no reason to doubt this.

6 Q. And you recall -- looking at this schedule,
7 is that consistent with your memory that CBW had
8 located some refinancing options?

9 A. I have no memory of CBW locating refinancing
10 options.

11 Q. Do you remember anyone else locating
12 refinancing options for the properties during the
13 period September 30, 2003 to September 30, 2004?

14 A. Yes.

15 Q. Who located those opportunities?

16 A. They were through HUD.

17 Q. Okay. When you say they were through HUD,
18 do you mean that somebody went through some sort of
19 a process with HUD to try and identify sources of
20 refinancing?

21 A. Well, I'm certainly no expert in this field.
22 But it's my understanding that private lenders, and
23 there's one in particular called Charles River or
24 Charles River Mortgage, which is very active in

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1 this. Private lenders loan to health care
2 facilities, and the loans are guaranteed by the
3 United States of America. So they're obviously
4 attractive loans. And it's my understanding that
5 there was HUD financing available for these
6 facilities.

7 Q. Did you have any communications with anyone
8 at HUD about that?

9 A. No.

10 Q. Did you have any communications with any
11 potential lenders?

12 A. No.

13 Q. During the period September 30, 2003 to
14 September 30, 2004, did you review any paperwork
15 that indicated that there were lenders who were
16 interested in lending money to these facilities with
17 the guarantee from HUD?

18 A. I can't recall.

19 Q. Do you recall any discussion of where
20 those -- where -- strike that.

21 During this May 5, 2004 conference call,
22 do you remember there being any discussions while
23 CBW was on the phone of where things stood with
24 these HUD opportunities?

17 (Pages 62 to 65)

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<p style="text-align: right;">Page 66</p> <p>1 A. I don't remember.</p> <p>2 Q. Looking at this summary, the solicitation</p> <p>3 update summary, you'd agree with me that by far the</p> <p>4 highest offer to buy the properties was from Epoch</p> <p>5 Senior Living?</p> <p>6 A. I don't know what you mean by "by far." The</p> <p>7 highest range is Epoch Senior Living, but they start</p> <p>8 at 27 million dollars and Care Ventures ends at 27</p> <p>9 million dollars. So I don't know what you mean by</p> <p>10 "by far."</p> <p>11 Q. Actually I'm sorry, I wasn't clear in my</p> <p>12 question. You see that on the far right there's a</p> <p>13 chart that indicates the ranges that were provided</p> <p>14 in the initial indications of interest?</p> <p>15 A. Yes.</p> <p>16 Q. And then to the left of that, there's a</p> <p>17 column that provides the numbers as they actually</p> <p>18 came in, in the letters of intent; do you see that?</p> <p>19 A. Okay, I do see that.</p> <p>20 Q. When I was talking about Epoch's number</p> <p>21 being the highest, I was referring to the numbers</p> <p>22 that were actually in the letters of intent.</p> <p>23 A. My only quarrel is "by far," because that's</p> <p>24 somewhat suggestive. There's no question that Epoch</p>	<p style="text-align: right;">Page 68</p> <p>1 discussion of moving forward with Epoch based on the</p> <p>2 fact that the amount that was in their letter of</p> <p>3 intent was clearly higher than anyone else's?</p> <p>4 A. I don't know whether that was during the</p> <p>5 call or sometime thereafter.</p> <p>6 Q. Do you recall whether during that part of</p> <p>7 the call where CBW was on the line, there being a</p> <p>8 discussion with moving forward with any other</p> <p>9 option, other than Epoch?</p> <p>10 A. Yes.</p> <p>11 Q. What other option?</p> <p>12 A. Again, I think that the option was the HUD</p> <p>13 refinance. And another option was to -- I think</p> <p>14 there was some concern that Epoch's number was,</p> <p>15 believe it or not, too high. And therefore</p> <p>16 unsustainable.</p> <p>17 Q. Who expressed that concern?</p> <p>18 A. I think it was Barry Freid during the call.</p> <p>19 Q. Do you remember whether anyone other than</p> <p>20 Barry voiced that concern?</p> <p>21 A. I don't remember.</p> <p>22 Q. What do you recall the discussion being</p> <p>23 after -- strike that.</p> <p>24 At some point in time during the call,</p>
<p style="text-align: right;">Page 67</p> <p>1 is the highest.</p> <p>2 Q. During that part of the conference call</p> <p>3 where CBW was on the line, do you remember what</p> <p>4 CBW -- let me ask you this, do you remember who from</p> <p>5 CBW was on the conference call?</p> <p>6 A. The problem is for me that everyone's name</p> <p>7 is Matt.</p> <p>8 Q. Okay.</p> <p>9 A. So I'm not sure who was on the conference</p> <p>10 call. And at that particular point in time, I had</p> <p>11 never met anyone from CBW, to my knowledge. So, I</p> <p>12 believe it was more than one person. But both of</p> <p>13 them may have been named Matt. So it might have</p> <p>14 been Matt Caine and Matt Ryan. I'm not sure.</p> <p>15 Q. Do you recall what the folks from CBW said</p> <p>16 as part of this conference call?</p> <p>17 A. I don't have a specific recollection of what</p> <p>18 was said.</p> <p>19 Q. Do you recall that they went through this</p> <p>20 summary and talked about the various letters of</p> <p>21 intent that had been received?</p> <p>22 A. That is my memory, yes.</p> <p>23 Q. During the part of the call where CBW was</p> <p>24 participating, do you remember there being</p>	<p style="text-align: right;">Page 69</p> <p>1 did the CBW folks leave the call and was there</p> <p>2 further discussion among other -- the remaining</p> <p>3 people who had started on the call?</p> <p>4 A. My memory is that the call terminated. And</p> <p>5 then -- and then the same client group, my client</p> <p>6 group that was present in the call had a</p> <p>7 conversation with me.</p> <p>8 Q. In terms of the various offers that were</p> <p>9 summarized in this solicitation update during that</p> <p>10 conference, did anyone express concerns about moving</p> <p>11 forward with Epoch?</p> <p>12 A. I can't answer that.</p> <p>13 Q. Now, you were present at Barry Freid's,</p> <p>14 Gerald Freid's and Georgia Freid's depositions,</p> <p>15 correct?</p> <p>16 A. Correct.</p> <p>17 Q. Would you agree with me all three of them</p> <p>18 testified at length about the conversations that</p> <p>19 were had with you about who to move forward with?</p> <p>20 A. I don't know what "at length" means. I</p> <p>21 don't know whether those conversations that they</p> <p>22 testified to were with CBW present or persons other</p> <p>23 than the client group present. I am constrained to</p> <p>24 protect, since there is no waiver, the maximum</p>

18 (Pages 66 to 69)

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<p style="text-align: right;">Page 70</p> <p>1 attorney/client privilege. And I can't testify to 2 my recollection of conversations with the client. 3 Q. Have you reviewed those transcripts to make 4 a determination as to whether or not there has been 5 a waiver? 6 A. I don't believe there has been a waiver. 7 Q. At some point in time following the 8 conference call with CBW where these various offers 9 were discussed, did you contact Matt Caine and 10 advise him that The Pointe Group wanted to move 11 forward with Epoch? 12 A. I don't recall doing that. I may very well 13 have. 14 Q. Did you, from the time of that conference 15 call to the time that the letter of intent, the 16 final letter of intent was signed with Epoch, did 17 you ever express to Matt Caine that your clients 18 desired to move forward with anyone other than 19 Epoch? 20 A. I don't think so. 21 Q. Did you -- 22 A. Actually, that's not true. I think at some 23 point I made a request to see if all of these people 24 would separate their offers for Chestnut Hill and</p>	<p style="text-align: right;">Page 72</p> <p>1 Q. Do you recall who made the decision to move 2 forward with Epoch? 3 A. I can't answer that question. 4 Q. At the time the decision was made to move 5 forward with Epoch, did you in your own mind have 6 any concerns about the quality of CBW's services as 7 of that date? 8 A. Did I? 9 Q. Correct. 10 A. I can't answer that question. 11 Q. Between the time that you first were 12 retained by the KeyBank Financed Entities and the 13 time that the decision was made to move forward with 14 Epoch, had you communicated to CBW any concerns or 15 complaints about their performance through that 16 date? 17 A. I don't think so. 18 Q. Now, in that time frame, the spring of 2004, 19 if someone had asked you what your own opinion was 20 as to the fair market value of these three 21 facilities, would you have had the knowledge or 22 expertise to make that kind of determination? 23 A. No. 24 Q. Do you have any knowledge, as you sit here</p>
<p style="text-align: right;">Page 71</p> <p>1 Cranberry Pointe. I believe I made that request. 2 Q. To CBW? 3 A. I don't know whether I made that request or 4 I knew that request had been made. I'm not sure 5 that, that's specifically an answer to your 6 question, but I think it's certainly germane. 7 Q. Do you recall whether that -- whether you 8 ever saw that breakdown in numbers? 9 A. I don't think I ever saw that breakdown. 10 Q. Between the time of the conference call and 11 the time that the letter of intent with Epoch was 12 signed, did you ever advise anyone at CBW that your 13 clients had concerns about moving forward with Epoch 14 because the price was too high? 15 A. Did I? 16 Q. Yes. 17 A. I may have. I don't remember. I don't 18 remember doing that, but I may have. 19 Q. As of the time that the decision was made to 20 go forward with Epoch -- strike that. 21 You're not sure whether or not it was 22 you who communicated the decision to move forward 23 with Epoch; is that right? 24 A. That's correct.</p>	<p style="text-align: right;">Page 73</p> <p>1 today, whether or not in the spring of 2004 a 2 lender, whether guaranteed by HUD or not, would have 3 been willing to lend money to the KeyBank Financed 4 Facilities on terms that would have been sufficient 5 to satisfy the obligations to KeyBank? 6 A. I don't know. 7 Q. You couldn't say one way or the other? 8 A. I don't know. 9 Q. After the decision was made to move forward 10 with Epoch, would it be fair to say that on behalf 11 of the KeyBank Financed Facilities, that you oversaw 12 the negotiations regarding the final letter of 13 intent with Epoch? 14 A. No, I don't think that would be fair to say. 15 Q. Okay. Do you know who was communicating 16 with Epoch in terms of the letter of intent? 17 A. I think it was both John McCullough and 18 myself or it may have been John McCullough through 19 me, and it may have been me through John McCullough 20 from time to time. 21 Q. Do you know whether it was you or John 22 McCullough -- at that time were you dealing with 23 Epoch directly, Larry Gerber, or were you dealing 24 with Epoch through counsel?</p>

19 (Pages 70 to 73)

<p style="text-align: right;">Page 74</p> <p>1 A. Only through counsel.</p> <p>2 Q. Mr. Gordon, I'm handing you what was</p> <p>3 previously marked as Exhibit 13.</p> <p>4 (Document exhibited to witness.)</p> <p>5 A. I see that.</p> <p>6 Q. You see that the cover page is a letter on</p> <p>7 your letterhead signed by Peter Haley dated May 24,</p> <p>8 2004 and directed to Andy Sucoff?</p> <p>9 A. Yes.</p> <p>10 Q. It says, "Enclosed please find a copy of the</p> <p>11 letter of intent as executed by The Pointe Group."</p> <p>12 Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. If you look at the letter of intent itself,</p> <p>15 do you recall who prepared the first draft of this?</p> <p>16 A. I don't.</p> <p>17 Q. Do you know whether it was your law office</p> <p>18 versus Epoch's counsel?</p> <p>19 A. I think it was unlikely to be my office.</p> <p>20 Q. The letter of intent is directed to an</p> <p>21 entity, The Pointe Group; do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. 50 Christie Place, Brockton, Mass. Did you</p> <p>24 ever advise anyone at the offices of Epoch's counsel</p>	<p style="text-align: right;">Page 76</p> <p>1 facilities to sell as part of the transaction?</p> <p>2 A. This is a non-binding document. As I said,</p> <p>3 it's -- the only obligation anyone has under this</p> <p>4 document is to negotiate in good faith towards a</p> <p>5 real deal. This is not a deal. I'm not denigrating</p> <p>6 the need for letters of intent just because I'm not</p> <p>7 a transactional lawyer. But as a trial lawyer, I</p> <p>8 know that I couldn't enforce a letter of intent.</p> <p>9 Q. At the time this letter of intent was</p> <p>10 signed, you had no knowledge that an abutter to the</p> <p>11 Chestnut Hill facility had a claim that there was an</p> <p>12 encroachment on its property; is that right?</p> <p>13 A. That's correct.</p> <p>14 (Exhibit 78 marked for identification.)</p> <p>15 (Document exhibited to witness.)</p> <p>16 Q. Mr. Gordon, looking at this document that's</p> <p>17 just been marked as Exhibit 78, this is a printout</p> <p>18 from your computer system of an e-mail that you sent</p> <p>19 to Madeline Kauffman on May 12th, correct?</p> <p>20 A. Yes.</p> <p>21 Q. At the time that you sent this e-mail to</p> <p>22 Ms. Kauffman as indicated in the first sentence of</p> <p>23 the e-mail, the purchase price or the contemplated</p> <p>24 purchase price was 37 million, correct?</p>
<p style="text-align: right;">Page 75</p> <p>1 that The Pointe Group had nothing to sell and no</p> <p>2 involvement in this transaction?</p> <p>3 A. I don't think I had to point that out to</p> <p>4 them.</p> <p>5 Q. Whether you needed to or not, you never did?</p> <p>6 A. Epoch has very good lawyers. It would have</p> <p>7 been, I think, offensive for me to -- for me to talk</p> <p>8 that way to them.</p> <p>9 Q. Well, wasn't it important to you that the</p> <p>10 letter of intent be with the appropriate parties?</p> <p>11 A. The letter of intent was not important to me</p> <p>12 at all. Letters of intent are only an agreement to</p> <p>13 try and reach an agreement.</p> <p>14 Q. If you look at the last page, there's</p> <p>15 actually not a page number on it. But at the top in</p> <p>16 the right-hand corner it says page 11 of 13 of a</p> <p>17 fax, and it's the signature page of the document.</p> <p>18 A. Yes.</p> <p>19 Q. You see that it's signed by Barry Freid on</p> <p>20 behalf of The Pointe Group?</p> <p>21 A. Correct.</p> <p>22 Q. And it wasn't important to you that Barry</p> <p>23 Freid was signing this document on behalf of The</p> <p>24 Pointe Group, even though The Pointe Group had no</p>	<p style="text-align: right;">Page 77</p> <p>1 A. Yes.</p> <p>2 Q. When you wrote this e-mail, if you look at</p> <p>3 the second full paragraph, there's certain indented</p> <p>4 items that you were indicating to Ms. Kauffman the</p> <p>5 Freid family would be willing to accept in</p> <p>6 settlement from the sales proceeds in addition to</p> <p>7 the sum of 2,568,000 dollars. The first item you</p> <p>8 identified was cancellation of the shareholder loan</p> <p>9 and fees still due; do you see that?</p> <p>10 A. Yes.</p> <p>11 Q. What does that refer to, the shareholder</p> <p>12 loan?</p> <p>13 A. Exactly what it says.</p> <p>14 Q. Who is the loan -- was the loan in favor of</p> <p>15 KeyBank?</p> <p>16 A. I believe so, yes.</p> <p>17 Q. Who were the obligors?</p> <p>18 A. I don't recall who the obligors were.</p> <p>19 Q. You obviously knew at the time.</p> <p>20 A. I'm not sure.</p> <p>21 Q. The next item says payment of Chestnut Hill</p> <p>22 construction debt guaranteed by members of the Freid</p> <p>23 family; do you see that?</p> <p>24 A. Yes.</p>

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<p style="text-align: right;">Page 78</p> <p>1 Q. Was it your suggestion that this would be a 2 debt that would be paid at the time of the closing? 3 A. I've included it in this e-mail. 4 Q. Okay. Not something that would be paid by 5 KeyBank outside of the closing, but something that 6 would be paid out of the sale proceeds? 7 A. I don't think that was even considered. 8 Q. Then there's a reference to Stanley 9 Wallerstein incentive fee, 150 thousand dollars; do 10 you see that? 11 A. Yes. 12 Q. What does that refer to? 13 A. Mr. Wallerstein was prior counsel, and he 14 had negotiated a fee agreement, which had a premium 15 or incentive fee of 150 thousand dollars in it. 16 Q. Was that ever paid, to your knowledge? 17 A. No. 18 Q. What about the Chestnut Hill construction 19 debt that was guaranteed by members of the Freid 20 family, was that ever paid? 21 A. I think that was paid before the closing. 22 That was zeroed out before the closing. I think 23 items one and two were the subject of regular 24 monthly payments. And in the months that it took to</p>	<p style="text-align: right;">Page 80</p> <p>1 account? Whose account is that? 2 A. I believe it was Georgia Freid's account. 3 Q. You go on to say in addition, the broker's 4 commission. By that did you mean the payments that 5 were due to CBW? 6 A. Yes. 7 Q. And the Cranberry Pointe Medicare Medicaid 8 recoupment will have to come out of the sale 9 proceeds, correct? 10 A. Right. 11 Q. So when you wrote this e-mail to 12 Ms. Kauffman, it was your understanding that CBW's 13 fee had to come out of the sale proceeds? 14 A. Yes. 15 (Exhibit 79 marked for identification.) 16 (Document exhibited to witness.) 17 Q. Mr. Gordon, in this -- this is another 18 e-mail that was printed out from your system, 19 correct? 20 A. Correct. 21 Q. You see the bottom e-mail is from Matt Caine 22 to you and some other individuals on May 12, 2004. 23 And your e-mail back on May 12th of 2004 at 7:12 24 p.m. says, "Matt, we were working full time to reach</p>
<p style="text-align: right;">Page 79</p> <p>1 get to a closing, they were reduced in the ordinary 2 course, I believe. 3 Q. Do you remember who the obligor was on the 4 Chestnut Hill construction debt? 5 A. I do. 6 Q. Who was it? 7 A. Lenny Rudofsky, R-U-D-O-F-S-K-Y. 8 Q. Who paid him? 9 A. I don't know. 10 Q. What's the basis of your understanding that, 11 that was zeroed out before the closing? 12 A. He told me. 13 Q. Is he a builder? 14 A. He's deceased. 15 Q. What was he before he was deceased? 16 A. He had a construction company. The 17 construction company that constructed the Chestnut 18 Hill facility. 19 Q. What's the name of the company? Is it still 20 around? 21 A. It is not. I believe it was Beaver 22 Builders. 23 Q. Then the fourth item says release of the UBS 24 Paine Webber account. What is the UBS Paine Webber</p>	<p style="text-align: right;">Page 81</p> <p>1 at least an agreement in principle with KeyBank." 2 Then skipping over a sentence. "I am not able to 3 involve you in the details of our discussions with 4 the bank, as I'm sure you can well understand." Do 5 you see that? 6 A. Yes. 7 Q. When you wrote this e-mail, what was the 8 reasoning that you were trying to communicate to 9 Mr. Caine as to why Mr. Caine couldn't be involved 10 in details of your discussions with the bank? 11 A. There was nothing that he could add. It 12 would just frankly be a waste of time. 13 Q. So it wasn't -- you weren't trying to 14 communicate to Mr. Caine that you thought there was 15 any sort of a privilege that attached to those 16 communications with the bank? 17 A. No. 18 (Exhibits 80 and 81 marked for 19 identification.) 20 (Documents exhibited to witness.) 21 Q. Mr. Gordon, you see the document that was 22 marked as Exhibit 80 is a printout, again e-mails 23 that were printed out from your computer system; is 24 that right?</p>

21 (Pages 78 to 81)

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<p style="text-align: right;">Page 82</p> <p>1 A. Yes.</p> <p>2 Q. The top message is response to a message you</p> <p>3 received from Andy Sucoff about employees that were</p> <p>4 going with the facilities versus those that were</p> <p>5 not?</p> <p>6 A. Yes.</p> <p>7 Q. Do you recall whether prior to this --</p> <p>8 receiving this e-mail from Andy Sucoff, this May</p> <p>9 27th e-mail, you were involved in any discussions</p> <p>10 with Epoch as to what personnel were going with the</p> <p>11 facilities?</p> <p>12 A. I don't believe I was involved in that.</p> <p>13 Q. Looking at the next exhibit, Exhibit 81,</p> <p>14 which is your e-mail to Matt Caine on May 28th of</p> <p>15 2004, you say, "Mr. Caine, as a result of a</p> <p>16 telephone conversation you had with Larry Gerber, he</p> <p>17 has placed additional, non-negotiable demands upon</p> <p>18 The Pointe Group." Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. What were those non-negotiable demands?</p> <p>21 A. Keeping two is non-negotiable.</p> <p>22 Q. Keeping two what?</p> <p>23 A. Keeping two people. That's what Mr. Sucoff</p> <p>24 said that Mr. Gerber had said. Well, he forwarded</p>	<p style="text-align: right;">Page 84</p> <p>1 Q. Where you're saying "once again."</p> <p>2 A. I don't know whether I'm saying this is yet</p> <p>3 another instance or to repeat myself, which I can be</p> <p>4 guilty of. Maybe there was a prior telephone</p> <p>5 conversation in which I'm just saying once again in</p> <p>6 the sense of I'm telling you this again. I don't</p> <p>7 know which it was.</p> <p>8 Q. When you wrote this e-mail, what did you</p> <p>9 understand that Mr. Caine had done?</p> <p>10 A. Mr. Caine had communicated with the buyer</p> <p>11 and had agreed with the buyer, Epoch, that Epoch was</p> <p>12 right and the seller was wrong.</p> <p>13 Q. What's the basis of your statement that</p> <p>14 Mr. Caine agreed with Mr. Gerber?</p> <p>15 A. That's my memory.</p> <p>16 Q. How did you learn that or from whom did you</p> <p>17 learn that?</p> <p>18 A. It may have been in a telephone conversation</p> <p>19 with Andy Sucoff. This was -- this had become on</p> <p>20 the Friday before Memorial Day a deal breaker. And</p> <p>21 I spent a great deal of time on the telephone,</p> <p>22 because Andy Sucoff reached out to me, we had a nice</p> <p>23 relationship, to solve this small problem. I</p> <p>24 suggested that it was a small problem and it ought</p>
<p style="text-align: right;">Page 83</p> <p>1 to me a message that Mr. Gerber had sent to the</p> <p>2 broker, which was CBW.</p> <p>3 Q. So that was what you were referring to?</p> <p>4 A. Yes.</p> <p>5 Q. Do you know whether ultimately those</p> <p>6 positions ended up being filled by people who were</p> <p>7 from the old operation of the facility versus new</p> <p>8 people? Do you know how that issue ultimately was</p> <p>9 resolved?</p> <p>10 A. I believe it was resolved in Epoch's favor.</p> <p>11 Q. You go on to say, "Once again your</p> <p>12 involvement has proved harmful to The Pointe Group.</p> <p>13 What did you mean first by saying "once again"?</p> <p>14 A. There must have been a previous instance</p> <p>15 where the broker stuck his nose into something and</p> <p>16 didn't turn out well. I don't know what I was</p> <p>17 referring to there.</p> <p>18 Q. You don't have a recollection?</p> <p>19 A. I don't have a recollection.</p> <p>20 Q. You go on to say, "Your involvement has</p> <p>21 proved harmful to The Pointe Group." You don't have</p> <p>22 a recollection of what was harmful to The Pointe</p> <p>23 Group?</p> <p>24 A. In this particular --</p>	<p style="text-align: right;">Page 85</p> <p>1 to be resolved in the seller's favor. And my memory</p> <p>2 is that did not work.</p> <p>3 Q. The e-mail simply relates what was said to</p> <p>4 Matt Caine, correct? If you look at the e-mail from</p> <p>5 Andy Sucoff to you, correct, it says, "I spoke to</p> <p>6 Matt Caine. I gave him my position." It doesn't</p> <p>7 say anything about whether or not Matt Caine agreed</p> <p>8 with that position or not, correct?</p> <p>9 A. I don't know. It says with respect to the</p> <p>10 marketing function, Maureen Lewis, they acknowledge</p> <p>11 that she spends most of her time at Hammond. I</p> <p>12 don't know whether that came from Matt Caine. The</p> <p>13 e-mail doesn't tell the whole story, because there</p> <p>14 were multiple telephone calls that day as well.</p> <p>15 Q. And you have a specific recollection of</p> <p>16 hearing from someone that Matt Caine had agreed with</p> <p>17 Larry Gerber?</p> <p>18 A. Yes.</p> <p>19 Q. And you're certain about that?</p> <p>20 A. No, I'm not certain about that.</p> <p>21 (Exhibit 82 marked for identification.)</p> <p>22 (Document exhibited to witness.)</p> <p>23 Q. Mr. Gordon, this document that was marked as</p> <p>24 Exhibit 82, you see at the bottom of the document</p>

22 (Pages 82 to 85)

<p style="text-align: right;">Page 86</p> <p>1 you're asking Andy Sucoff how much involvement does 2 your client wish the broker, CBW, to have in the 3 process; do you see that? 4 A. Yes. 5 Q. Then there's a response from Andy Sucoff 6 saying, "The brokers have been our only contact to 7 date. I'm inclined to keep them in the loop, unless 8 they're not being helpful," correct? 9 A. Yes. 10 Q. Then at the top you say, "No problem, and I 11 will simultaneously submit documents to you and the 12 broker." Do you see that? 13 A. Yes. 14 Q. So when you sent this e-mail back to Andy 15 Sucoff, it was your understanding that Epoch wanted 16 CBW to continue to be in the loop, correct? 17 A. Yes. 18 Q. And you said no problem, correct? 19 A. Well, there's an unless they are not being 20 helpful in there, too. 21 Q. But as of the date you sent this e-mail, May 22 17th, did you have any reason to believe that CBW 23 was not being helpful? 24 A. Apparently not.</p>	<p style="text-align: right;">Page 88</p> <p>1 sale agreement? 2 A. I can't speculate. I don't even know that I 3 did. My best memory is that I did not refuse to 4 give the broker a copy of the purchase and sale 5 agreement, but it is possible that I did. 6 MS. HIGGINS: Kind of at a sticking 7 point since I have more exhibits to mark, and 8 there's no stickers. So I'm going to go look for 9 exhibit stickers. 10 (Discussion off the record.) 11 MS. HIGGINS: Let's mark this as the 12 next exhibit. 13 (Exhibit 83 marked for identification.) 14 (Document exhibited to witness.) 15 Q. Mr. Gordon, this again is a printout of an 16 e-mail from your computer system? 17 A. Yes, it is. 18 Q. It's a e-mail from you to Madeline Kauffman, 19 May 19, 2004, correct? 20 A. Correct. 21 Q. In this e-mail you're confirming a proposal 22 that Madeline Kauffman made to you? 23 A. I believe, yes. 24 Q. Regarding the disbursement of proceeds from,</p>
<p style="text-align: right;">Page 87</p> <p>1 Q. You then say, "We will simultaneously submit 2 documents to you and the broker." Do you see that? 3 A. Yes. 4 Q. Did you do that? 5 A. I don't know. 6 Q. Isn't it true that CBW asked you for a copy 7 of the purchase and sale agreement, and that you 8 refused to give it to them? 9 A. I don't think that's true. It's possible, 10 but I don't think so. 11 Q. Do you remember Matt Caine asking you for a 12 copy of the purchase and sale agreement? 13 A. I remember him asking me for either a copy 14 of the purchase and sale agreement or the section of 15 the purchase and sale agreement that referred to the 16 broker. And my memory is that I responded by 17 sending him the portion of the purchase and sale 18 agreement that referred to the broker. 19 Q. Do you have any memory of refusing to send 20 him the entire document? 21 A. I don't. It's possible, but I don't have 22 any memory of having done that. But it is possible. 23 Q. If you did do that, what reason would you 24 possibly have for not giving him the purchase and</p>	<p style="text-align: right;">Page 89</p> <p>1 as it says here, the Chestnut Hill Cranberry Pointe 2 sale proceeds? 3 A. Correct. 4 Q. This reflects a broker's commission of a 5 million dollars, correct? 6 A. Yes. 7 Q. That was, to your understanding, was an 8 amount payable to CBW, correct? 9 A. Yes, based on a 37 million dollar sale. 10 Q. Correct. 11 A. No, actually not at that point, because I 12 guess I had not seen the Exhibit 4. 13 Q. The engagement letter? 14 A. So this was a plug number that everyone was 15 working with for some reason. 16 Q. In the second paragraph after the 17 itemization, it says, "The balance of the sale 18 proceeds will be split 50/50 between the bank and 19 the Freid family." Do you see that? 20 A. Yes. 21 Q. Then it says, "The attorney's fees will be 22 forgiven." What does that refer to? 23 A. The bank documents provide for the borrower 24 to pay all attorney's fees, and the bank was not</p>

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1 going to charge those attorney's fees back to the
2 borrower.
3 Q. I see. Do you know whether after this date
4 of May 19th, did the bank ever require the payment
5 of its attorney's fees?
6 A. I don't recall.
7 Q. Had you had any discussions with Madeline
8 Kauffman up to this point as to when you say in this
9 e-mail the balance of the sale proceeds will be
10 split 50/50 between the bank and the Freid family,
11 as to which members of the Freid family would get
12 any excess sale proceeds?
13 A. No.
14 (Exhibit 84 marked for identification.)
15 (Document exhibited to witness.)
16 Q. This again, Mr. Gordon, is a printout of an
17 e-mail from your computer system from you to Matt
18 Caine on May 19th at 10:32 p.m.; is that right?
19 A. Yes, it is.
20 Q. If you look at the exhibit that we just
21 looked at, 83, that e-mail -- this e-mail, Exhibit
22 84, was sent later in the same day; is that right?
23 A. Yes.
24 Q. When you tell Mr. Caine all the members of

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1 the Freid family and KeyBank have reached an
2 agreement in principle on the distribution of the 37
3 million Epoch sale proceeds, are you referring to
4 the breakdown that is reflected in Exhibit 83?
5 A. I believe so, yes.
6 Q. I should have asked you this before. Do you
7 remember Ms. Kauffman -- in your e-mail saying to
8 Ms. Kauffman, "Have I got it right?" Do you
9 remember whether Ms. Kauffman disagreed with
10 anything you had in your e-mail?
11 A. I don't have any memory of her disagreeing.
12 (Exhibit 85 marked for identification.)
13 (Document exhibited to witness.)
14 Q. Mr. Gordon, this is a printout of an e-mail
15 from your system dated Wednesday, May 19, 2004, from
16 you to Andy Sucoff; is that correct?
17 A. Yes.
18 Q. In this e-mail, you say, "The broker tells
19 me that Epoch is very concerned about whether there
20 is an agreement between The Pointe Group and
21 KeyBank." Do you see that?
22 A. Yes.
23 Q. By that, are you referring to CBW?
24 A. I believe so.

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1 Q. Do you recall what CBW communicated to you
2 that lead you to write this e-mail?
3 A. I think that very thought.
4 Q. Which is what?
5 A. That Epoch was concerned about whether there
6 was an agreement between the sellers and KeyBank to
7 permit a 37 million dollar sale, because 37 million
8 dollars was less than the amount owed to KeyBank.
9 Q. Do you remember whether -- who communicated
10 that to you from CBW?
11 A. I'm tempted to say Matt Caine, but I don't
12 know whether I actually remember that or whether
13 because I've seen the previous e-mails, and I was
14 communicating to him I learned that from him.
15 Again, I have a confusion of the two Matts. I would
16 say it had to be one of the two Matts.
17 Q. When the individual from CBW relayed to you
18 this concern that Epoch had, did you say back to
19 this person from CBW, "I don't want you talking to
20 Epoch"?
21 A. I'm sure I did not.
22 Q. Did you think there was anything
23 inappropriate about CBW relaying to you a concern
24 that Epoch had expressed?

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1 A. No, I didn't.
2 Q. We previously looked at an e-mail in which
3 Epoch's counsel had said that Epoch would prefer to
4 keep CBW in the loop; is that right? Do you
5 remember that e-mail?
6 A. I think there was a qualification to it.
7 Q. As long as they were being helpful, correct?
8 A. I think it was actually in the reverse.
9 Q. Unless they were being unhelpful?
10 A. I think so.
11 Q. We can look at it.
12 A. Unless they are not being helpful was the
13 word.
14 Q. Did anyone from Epoch ever indicate to you
15 that they believed that CBW was being unhelpful?
16 A. I don't remember that.
17 Q. Did anyone from Epoch ever indicate to you
18 that they believed that the involvement of Barry
19 Freid was harmful to the transaction?
20 A. Yes.
21 Q. Who was that?
22 A. Andy Sucoff.
23 Q. Do you remember what Mr. Sucoff thought in
24 particular was unhelpful about Barry Freid's

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1 involvement?

2 A. Mr. Sucoff thought that Barry was opposed to
3 the sale and was concerned that he would sabotage
4 it.

5 Q. Did Mr. Sucoff ever point you to any
6 specific examples of conduct by Mr. Freid that he
7 thought demonstrated that?

8 A. He might have.

9 Q. Do you recall those right now?

10 A. There was something about a copier being
11 removed from Cranberry Pointe or a fax machine or
12 something. Then there was a question of whether it
13 was owned by Cranberry Pointe or whether it was
14 owned by a different entity and shouldn't have been
15 included in the sale. Very, very small things. I
16 think that the concern was more of a global concern
17 than a specific item by item concern.

18 Q. During the time period September 30, 2003 to
19 September 30, 2004, to the best of your knowledge,
20 was Barry Freid an officer, director or employee of
21 any of the KeyBank Financed Facilities?

22 A. I don't know.

23 Q. You don't have knowledge one way or the
24 other?

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1 A. I don't.

2 Q. Same question with respect to Gerald Freid,
3 do you have knowledge one way or the other as to
4 whether he was an officer, director, employee of any
5 of those entities?

6 A. I don't know.

7 Q. Do you have any idea why -- you know, it
8 seems to me, looking through the various
9 communications relating to the sale to Epoch that
10 Barry Freid and Gerald Freid were more heavily
11 involved on the seller's side than anyone else. Do
12 you have any idea why that is so?

13 A. No. Actually I should say I'm not even sure
14 that is so. I know you preface it by saying "based
15 on the communications," but I'm not so sure that is.

16 Q. Well, you probably looked at most of these
17 documents, too, correct?

18 A. Yes.

19 Q. Have you made any observation based on the
20 documents as to who was most involved in the
21 transaction from the seller's side?

22 A. Most of the transaction was invisible to me.

23 MS. HIGGINS: Mark that as the next
24 exhibit.

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1 (Exhibit 86 marked for identification.)

2 (Document exhibited to witness.)

3 Q. Mr. Gordon, this e-mail -- the e-mail that's
4 reflected on the first page -- I guess I should
5 really start with -- if you look at the last e-mail
6 in the spring, which is the e-mail that was sent
7 from you to Matt Caine on May 19th, that's an e-mail
8 that we previously looked at that references the
9 Freid family and KeyBank having reached an agreement
10 in principle; do you see that?

11 A. Yes, I do.

12 Q. And in response to that -- then preceding
13 that, as you go backwards is an e-mail from you to
14 Matt Caine, it's actually not preceding, it's
15 afterwards, May 20, 2004. You say in that e-mail --
16 I'm sorry, there is another e-mail here. It's kind
17 of confusing to follow. Matt Caine then sends an
18 e-mail to you saying, "Did you have any
19 conversations with Andy Sucoff today?" Then you
20 send him an e-mail saying, "Andy has not called me
21 in response to yesterday's e-mail. I'm about to
22 call him with Madeline Kauffman on the line. Please
23 respond to this e-mail with as near as you are able
24 a verbatim transcription of the voice mail you left

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1 yesterday for Steve Dunham and, quote, reply to all
2 as I think it important for both the principals of
3 The Pointe Group and me to know exactly what message
4 you left for him." Do you see that?

5 A. Yes.

6 Q. Who were the principals of The Pointe Group?

7 A. You know, principals is a non-technical
8 word. So I don't know what's --

9 Q. You don't remember what you were trying to
10 convey to Mr. Caine as far as who were you referring
11 to when you wrote this e-mail?

12 A. Well, if he replied to all, he would be
13 replying to everyone that I had sent the e-mail to.

14 Q. So when you indicated reply to all, we can
15 look at the cc's here, those were e-mail addresses
16 for Gerry Freid, Barry Freid, Frank Barker and your
17 partner, Peter Haley is obviously something
18 different, but when you communicated this message to
19 him then, what you're saying is you thought the
20 principals of The Pointe Group were Gerry Freid,
21 Barry Freid and Frank Barker?

22 A. No, Georgia Freid is also on there.

23 Q. Okay. So that's what you intended to convey
24 to him when you referred to the principals of The

<p style="text-align: right;">Page 98</p> <p>1 Pointe Group?</p> <p>2 A. I can't tell you what I intended. I don't</p> <p>3 think I had any specific intention. I wanted the</p> <p>4 people who had received cc's to my e-mail to receive</p> <p>5 his reply.</p> <p>6 Q. Was there any specific reason that you</p> <p>7 wanted a verbatim as near as possible transcription</p> <p>8 of a voice mail that Mr. Caine left for Mr. Dunham?</p> <p>9 A. My memory is that Mr. Caine had somehow</p> <p>10 agitated Mr. Dunham, and I felt that, that was</p> <p>11 counter productive. And I needed to know exactly</p> <p>12 what it was that he had left for Mr. Dunham so I</p> <p>13 could treat with it and mollify KeyBank.</p> <p>14 Q. Do you remember what KeyBank was agitated</p> <p>15 about?</p> <p>16 A. I don't.</p> <p>17 Q. And you see above there's a responsive</p> <p>18 e-mail from Matt Caine that relates his conversation</p> <p>19 with Steve Dunham; do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. And he says that he called KeyBank to update</p> <p>22 them on the progression of the deal; do you see</p> <p>23 that?</p> <p>24 A. I see what he says, yes.</p>	<p style="text-align: right;">Page 100</p> <p>1 Q. You then go on to say, "Both as well as The</p> <p>2 Pointe Group are looking to their lawyers for advice</p> <p>3 and forward motion." Now, in that sentence when you</p> <p>4 were referring to The Pointe Group, were you</p> <p>5 referring to the selling entities?</p> <p>6 A. I believe so.</p> <p>7 Q. And you were referring -- in referring to</p> <p>8 the selling entities, you used the words The Pointe</p> <p>9 Group?</p> <p>10 A. I think lots of people have used that</p> <p>11 shorthand in conversation, in telephone</p> <p>12 conversations, in e-mails and personal conversation.</p> <p>13 The purchase and sale agreement, obviously, clearly</p> <p>14 identifies the selling entities.</p> <p>15 Q. You then go on to say, "I don't know if you</p> <p>16 are willing to accept that recommendation, but I</p> <p>17 believe that if you ignore it, you are putting the</p> <p>18 sale to Epoch at unnecessary jeopardy." Do you see</p> <p>19 that?</p> <p>20 A. I do.</p> <p>21 Q. Now, when you wrote that e-mail on May 20th,</p> <p>22 did you have knowledge of anything that CBW had done</p> <p>23 or said that potentially could jeopardize the sale</p> <p>24 to Epoch?</p>
<p style="text-align: right;">Page 99</p> <p>1 Q. Did you believe at that time that there was</p> <p>2 anything improper about CBW advising Key of the</p> <p>3 progression of the deal?</p> <p>4 A. No.</p> <p>5 Q. Was there anything in Mr. Caine's response</p> <p>6 that you considered to be -- to reflect improper</p> <p>7 behavior by CBW?</p> <p>8 A. No.</p> <p>9 Q. If you look -- now, the first page of the</p> <p>10 exhibit, Exhibit 86, you send yet another message to</p> <p>11 Mr. Caine as well as to various cc's. And in the</p> <p>12 third paragraph of that e-mail, you say, "I believe</p> <p>13 as I expressed to you on the phone that your</p> <p>14 communications at this point with both Epoch and Key</p> <p>15 are harmful, and I recommend that you leave the</p> <p>16 consummation of this deal to the lawyers." Do you</p> <p>17 see that?</p> <p>18 A. Yes.</p> <p>19 Q. Now, what was it that you believed was</p> <p>20 harmful about the communications that CBW was having</p> <p>21 with Epoch and Key?</p> <p>22 A. I don't recall.</p> <p>23 Q. You don't recall today?</p> <p>24 A. I don't recall today.</p>	<p style="text-align: right;">Page 101</p> <p>1 A. I must have.</p> <p>2 Q. Do you remember as you sit here today what</p> <p>3 that was?</p> <p>4 A. My memory is that they were agitating</p> <p>5 KeyBank unnecessarily, but I'm not exactly sure.</p> <p>6 This is not typical of the way in which I talk to</p> <p>7 people or write to people. So I was clearly</p> <p>8 agitated about something.</p> <p>9 Q. But as you sit here today, you don't</p> <p>10 remember exactly what CBW had done or said that</p> <p>11 caused you to write this e-mail?</p> <p>12 A. That's correct.</p> <p>13 (Exhibit 87 marked for identification.)</p> <p>14 (Document exhibited to witness.)</p> <p>15 Q. Mr. Gordon, as reflected in this e-mail,</p> <p>16 this May 21st e-mail, do you remember communicating</p> <p>17 to David Hankin and some others as identified on</p> <p>18 here that, "The Pointe Group will not agree under</p> <p>19 any circumstances to disclose the terms of its</p> <p>20 agreement with KeyBank"? Do you remember that</p> <p>21 communication being made?</p> <p>22 A. Yes.</p> <p>23 Q. My question is, was that something -- was</p> <p>24 that communication something that KeyBank had asked</p>

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1 you to make? In other words, was KeyBank the party
2 that did not want the terms of the letter of
3 agreement disclosed to the buyer?

4 A. I think neither KeyBank nor the sellers
5 wanted the agreement disclosed to the buyer.

6 Q. Do you remember having discussions with
7 Madeline Kauffman about that?

8 A. I don't remember discussions. I obviously
9 forwarded this e-mail to her, but I don't remember
10 discussions.

11 Q. Mr. Gordon, I'm handing you what was
12 previously marked as Exhibit 18 at Barry Freid's
13 deposition.

14 (Document exhibited to witness.)

15 Q. You see that's a copy of a letter that
16 Mr. Freid sent to CBW and there's a cc of the letter
17 to you?

18 A. Yes.

19 Q. Did you draft that letter?

20 A. I don't think so.

21 Q. Okay, I'll take that back. I'm handing you
22 what was previously marked as Exhibit 19 at Barry
23 Freid's deposition, and that is a letter from Matt
24 Caine at CBW in response to Barry Freid's letter

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1 that you just looked at.

2 (Document exhibited to witness.)

3 Q. You see that, that letter also is cc'd to
4 you?

5 A. I do see that.

6 Q. Do you remember reviewing this response from
7 Mr. Caine to Barry Freid's letter?

8 A. I don't have a memory of having reviewed it.

9 Q. You'll see, as you look through the letter
10 now, that Mr. Caine relates various events and
11 conversations that occurred, including some in which
12 you were involved. What I'd like you to do, you can
13 read through his letter silently and just tell me if
14 there's anything that he's relayed or recounted in
15 terms of communications that you were involved in
16 that's inaccurate.

17 A. I don't think that CBW stayed out of the
18 negotiation of the letter of intent. I think that
19 they did have discussions with Epoch over the letter
20 of intent and perhaps exhibits to the letter of
21 intent.

22 Q. Okay, we'll come back to that.

23 A. I'm still reading. That's the only thing
24 that I have knowledge of.

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1 Q. Okay. You said that you believe that CBW
2 had discussions with Epoch regarding the letter of
3 intent and certain exhibits to the letter of intent.
4 Were you referring to this conversation between
5 Larry Gerber and Mr. Caine and Mr. Ryan that's
6 referenced here with respect to exhibit C?

7 A. I don't know. I wasn't party to that
8 conversation.

9 Q. Okay. Maybe my question might not have been
10 a good one. I believe you said that in terms of
11 CBW's statement that it's abided by The Pointe
12 Group's instructions to allow Steve Gordon to
13 negotiate the letter of intent, that you believed
14 that CBW had involved itself in that process; is
15 that right?

16 A. Yes.

17 Q. And what is the basis of your statement?

18 A. That's my memory.

19 Q. What facts do you remember that lead you to
20 make that statement?

21 A. I have a memory of being extremely upset
22 that we were receiving non-negotiable demands from
23 Epoch. And my memory was -- my memory is that, that
24 was based upon Epoch saying that CBW agrees with

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1 them or something of the sort. That's the only
2 memory I have.

3 Q. Would it be fair to say that in any
4 conversations you had with CBW or any communications
5 you had with CBW on that issue, CBW never agreed
6 that they had acknowledged Epoch's demands as
7 reasonable?

8 A. That would be fair to say.

9 Q. Showing you what was previously marked as
10 Exhibit 20 at Barry Freid's deposition.

11 (Document exhibited to witness.)

12 Q. And, again, this is a letter from Barry
13 Freid to Matt Caine dated June 2, 2004 in which you
14 were copied; do you see that?

15 A. Yes.

16 Q. In this letter, Mr. Freid says, in the first
17 sentence he says, "It has come to my attention that
18 KeyBank is factoring a broker fee of one million
19 dollars into their agreement with The Pointe Group
20 regarding the sale of the Cranberry Pointe and
21 Chestnut Hill properties." Do you see that?

22 A. Yes.

23 Q. Now, is that a reference to this plug-in
24 figure that we were talking about earlier?

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<p style="text-align: right;">Page 106</p> <p>1 A. Yes. I think it is. This is Mr. Freid's 2 letter, but I think that is. 3 Q. So, to your knowledge, KeyBank was never 4 charging any sort of a broker's fee or commission, 5 apart -- 6 A. KeyBank? 7 Q. Correct. 8 A. No. 9 Q. Okay. Then in the second paragraph it says, 10 "We've approached KeyBank to adjust their figure but 11 are not receiving favorable response." Do you know 12 what Mr. Freid -- let me ask the question this way. 13 On June 2nd, the date that Mr. Freid wrote this 14 letter, do you recall that there had been an 15 approach to KeyBank to adjust the amount that it was 16 willing to take from the transaction? 17 A. Yes. 18 Q. At that point it's fair to say, isn't it, 19 that Epoch's purchase price had not changed, 20 correct? 21 A. Yes, that's correct. 22 Q. Do you have any memory of any conversations 23 that you had with KeyBank as to why their figure 24 needed to be adjusted if there had been no change in</p>	<p style="text-align: right;">Page 108</p> <p>1 some individuals; do you see that? 2 A. Yes. 3 Q. And I believe this has generally been 4 referred to in some of the correspondence and some 5 of the deposition testimony as a forbearance 6 agreement? 7 A. Yes. 8 Q. Are you comfortable with referring to it 9 that way? 10 A. I am comfortable. 11 Q. Let me ask you first, do you recall who 12 prepared the first draft of this letter agreement? 13 A. I do. 14 Q. Who is that? 15 A. Madeline Kauffman. 16 Q. Do you recall -- 17 A. I shouldn't say that, I'm sorry. I received 18 it from Madeline Kauffman. 19 Q. Do you recall if when you received the first 20 draft of this letter from Madeline Kauffman, whether 21 the language on page three, which appears under 22 paragraph six, requiring that there be first a 23 payment to Casas, Benjamin & White up to one million 24 250 thousand dollars; do you see that?</p>
<p style="text-align: right;">Page 107</p> <p>1 the purchase price? 2 A. At the 37 million dollar purchase price, 3 there was a sum of money that was going to KeyBank 4 and a sum of money above that, that was being 5 divided between KeyBank and the Freid family. And 6 in arriving at those numbers, that plug number of a 7 million dollars had been used. And when you 8 increase that to a million 250 thousand dollars, my 9 memory is that the request was that KeyBank reduce 10 the overage, if you will, by 125 thousand dollars 11 and the Freid family would do likewise. 12 Q. Do you remember the response from KeyBank to 13 that proposal? 14 A. I do. 15 Q. What was the response? 16 A. No. 17 Q. Handing you what was marked as Exhibit 21 at 18 Barry Freid's deposition. 19 (Document exhibited to witness.) 20 Q. Mr. Gordon, this document marked as Exhibit 21 21, which is a document that was testified about I 22 think by both Barry and Gerald Freid, and it's a 23 letter dated June 3, 2004 and it's addressed to the 24 selling entities, is that correct, as well as to</p>	<p style="text-align: right;">Page 109</p> <p>1 A. Yes. 2 Q. Was the language in that paragraph there 3 when you received the first draft from Madeline 4 Kauffman? 5 A. I don't know. 6 Q. Well, that isn't a paragraph that you would 7 have asked to be inserted, correct? 8 A. I can't necessarily say that. 9 Q. Was it your understanding that at the time 10 this agreement was signed, KeyBank's obligation 11 to -- strike that. Let me start again. 12 Was it your understanding at the time 13 that this forbearance agreement was signed, the 14 agreement dated June 3, 2004, that Key's agreement 15 to comply with the terms of this forbearance 16 agreement were premised in part on the payment to 17 CBW that's specified in paragraph 6A be made? 18 A. I don't understand that question. 19 Q. Okay. This forbearance agreement set out 20 the terms -- well, you see in the first paragraph, 21 the first paragraph of the letter on page one. 22 A. Yes. 23 Q. It says, "The following is provided in 24 follow-up to recent telephone conversations between</p>

28 (Pages 106 to 109)

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1 Key's counsel and you concerning the distribution
2 and application of sale proceeds in the event of a
3 sale," correct?

4 A. Correct.

5 Q. And was it your understanding that this
6 agreement then set out certain terms on which
7 KeyBank would forbear on its rights under various
8 loan documents?

9 A. Yes.

10 Q. In paragraph six, was it your understanding
11 that one of the conditions of Key's forbearance was
12 that the following payments would be made as
13 specified in paragraph six?

14 A. I don't want to split hairs with you, but I
15 don't understand that, "as a condition to
16 forbearance."

17 Q. Let's go back, then. Looking at the
18 language of paragraph six.

19 A. Yes.

20 Q. Was it your understanding at the time this
21 was signed that this paragraph required the
22 borrowers as defined in the agreement to pay or
23 cause to be paid the following and immediately
24 available funds and in the following order, first to

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1 Casas, Benjamin & White up to one million 250
2 thousand of the fee for investment banking services
3 due and owing to CBW upon the closing of the sale
4 transaction?

5 A. I think you're asking me for a legal
6 opinion. I don't -- how else would I have an
7 understanding of what this is? I'm not going to
8 give you a legal opinion.

9 Q. Well, maybe my question was unclear. But
10 I'm not asking you for an opinion as to how to
11 accurately read this. My question is what was your
12 understanding at the time that this was signed? Was
13 your understanding at the time that this agreement
14 required the borrowers to make the payment to CBW as
15 specified in the agreement?

16 A. My understanding at any time is as a lawyer.
17 So it is a legal opinion. Whether it was what was
18 my legal opinion then versus what my legal opinion
19 is now, it's still a legal opinion, and I can't
20 answer that.

21 Q. I disagree that you can't answer that. But
22 if you're refusing to answer, I'm not going to ask
23 it again. I'm handing you what's marked as -- was
24 marked at Barry Freid's deposition at Exhibit Number

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1 23.

2 (Document exhibited to witness.)

3 Q. Would you agree with me that's a subsequent
4 version of the forbearance agreement dated June 16,
5 2004?

6 A. Again, I don't want to split hairs with you,
7 but I think it's an amendment to it. "And except as
8 amended," there may be some language in here that
9 says "except as amended." Yeah, right at the
10 beginning it says, "The following limited
11 modifications to the June 3, 2003 letter."

12 Q. Okay. Do you remember why it was necessary
13 for Key and the sellers to execute an amendment?
14 Was there something that had changed?

15 A. I think the problem was that the
16 transactional lawyers couldn't guarantee that the
17 transaction would close by a certain period of time,
18 because certain regulatory authorities, these are
19 health care facilities, certain regulatory
20 authorities' permission was necessary. Epoch was
21 not willing to expend considerable time, money and
22 effort in pursuing the transaction only to find that
23 as a result of a delay in receiving that regulatory
24 approval, obviously beyond the control of anyone

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1 involved in the transaction, that the time allotted
2 by KeyBank had ended. So again, without reading
3 Exhibit 23 front to back, I think that this was
4 necessary to address Epoch's concern that KeyBank
5 could pull the plug, if you will, while all we're
6 doing is waiting for various regulatory authorities
7 to say yes to Epoch.

8 Q. Okay. Looking at the Exhibit 21, which we
9 were just looking at -- actually, here's the
10 original.

11 (Document exhibited to witness.)

12 Q. And this Exhibit 23, would you agree with me
13 that there are no changes to paragraph six as a
14 result of the amendments of June 16th?

15 A. Yes.

16 Q. Handing you what was previously marked as
17 Barry Freid -- at Barry Freid's deposition as
18 Exhibit 25.

19 (Document exhibited to witness.)

20 Q. If you would turn to -- it's actually on
21 this document, sub Paragraph 3 that deals with
22 changes to paragraph six; do you see that?

23 A. Yes.

24 Q. It says, "Paragraph six of the Key

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<p style="text-align: right;">Page 114</p> <p>1 forbearance agreement is hereby deleted and replaced 2 with the following." Then there are various 3 provisions. Would you agree with me that the 4 language pertaining to a payment to CBW was no 5 longer part of paragraph six? 6 A. Yes. 7 Q. Can you tell me whether in connection with 8 this, the negotiations with Key over this July 22nd 9 letter agreement, were there any discussions between 10 you and Madeline Kauffman with respect to changes to 11 paragraph six? 12 A. I don't recall. 13 Q. Do you recall any discussions with Madeline 14 Kauffman during the negotiation of this document 15 about whether there were sufficient -- going to be 16 sufficient sales proceeds to pay CBW's fee? 17 A. At this point in time? 18 Q. Yes. 19 A. No. 20 Q. So looking at the two documents together, 21 even though the two earlier letter agreements 22 contain a specific provision requiring the payment 23 of CBW's fee and the July 22nd letter does not, you 24 don't recall any discussions with Madeline Kauffman</p>	<p style="text-align: right;">Page 116</p> <p>1 Q. Is it your practice to, if you had done 2 something like that, would it have been your 3 practice to retain the drafts with your markups? 4 A. Probably not, although I'm not very often 5 marking up documents anymore, because they're all 6 electronic. 7 Q. If you do have occasion to make edits to a 8 document that you receive electronically, do you 9 typically do it by red line? 10 A. Yes. 11 Q. That was true at this time frame? 12 A. I don't know. I learn new things every day 13 on the computer. 14 Q. Do you have any personal knowledge, 15 Mr. Gordon, that CBW at any time conveyed any 16 information that you considered to be confidential 17 to Epoch or KeyBank? 18 A. No. 19 Q. Do you have any information -- 20 A. Well, confidential, I'm sorry, confidential 21 from whom? 22 Q. Maybe my question wasn't clear. My question 23 was whether you had any information to suggest that 24 CBW conveyed information that you considered to be</p>
<p style="text-align: right;">Page 115</p> <p>1 that lead to that provision not being in this 2 subsequent letter agreement? 3 A. I don't recall any specific discussions, but 4 Madeline Kauffman and I spoke often. And there must 5 have been discussions. And obviously the Epoch 6 price went down very substantially, and we had to 7 deal with that. This is the manner in which that 8 was dealt with. But I recall no specific -- no 9 specific discussion certainly of CBW. 10 Q. The July 22nd letter agreement, was the 11 first draft of that agreement also received by you 12 from Madeline Kauffman? 13 A. Again, I don't know whether it's the first 14 draft. The first draft I received was from Madeline 15 Kauffman. 16 Q. So your office did not prepare -- 17 A. No. 18 Q. -- a draft of this? 19 A. No, we did not. 20 Q. Do you recall with respect to just this one, 21 the July 22, 2004 forbearance agreement, do you 22 recall receiving any drafts from Madeline Kauffman 23 and marking those up and sending them back to her? 24 A. I don't have any memory of having done that.</p>	<p style="text-align: right;">Page 117</p> <p>1 confidential to either Epoch or KeyBank? 2 A. Again, I don't want to split hairs with you. 3 The answer to the question is yes, but I don't think 4 that -- it was confidential information, but I don't 5 think it was information that CBW ought not to have 6 shared with Epoch or KeyBank. They shouldn't have 7 told some stranger, but the parties to the 8 transaction, I have no knowledge of anything that 9 CBW said to either Epoch or KeyBank that was a 10 disclosure of information that should not have been 11 disclosed to one of those two. 12 Q. Do you have any information to suggest that 13 CBW did or failed to do anything that lead Epoch to 14 reduce the purchase price? 15 A. No. 16 Q. Looking back at Exhibit 19. I think I may 17 have given it back to you. Oh, you know, I have it. 18 Looking at the last paragraph, you see Mr. Caine 19 proposes setting up a conference call on June 4th to 20 discuss the issues that are addressed in his letter? 21 A. Yes, I see it. 22 Q. Do you remember participating in a 23 conference call on or about June 4th with Mr. Caine 24 and Ed Casas of CBW?</p>

30 (Pages 114 to 117)

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1 A. I think so, yes.

2 Q. Do you remember that the purpose of the call
3 was to address concerns that CBW was not being
4 helpful in the process?

5 A. Yes.

6 Q. Who do you remember being on the call, other
7 than Ed Casas and Matt Caine?

8 A. I don't remember who else was on that call.

9 Q. Were you in your office at the time of the
10 call?

11 A. I don't know.

12 Q. Do you remember as a result of the call that
13 you gained some level of comfort that CBW was in
14 fact working towards the transaction happening?

15 A. No, I did not.

16 Q. You did not?

17 A. No.

18 Q. What do you remember you saying during that
19 call?

20 A. I don't have a memory of what I said during
21 the call. I don't have any memory of what I said
22 during the call.

23 Q. Do you have a memory of anything that Matt
24 Caine said during the call?

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1 A. No. The only memory I have is I believe a
2 private call after that between Ed Casas and myself.

3 Q. Getting back to the first call. I believe
4 you said you had no memory of anything that Matt
5 Caine said during the call?

6 A. I don't.

7 Q. Do you have any memory of anything Ed Casas
8 said during that call?

9 A. No.

10 Q. Do you remember the general subject matters
11 discussed during that call?

12 A. Yes. The subject matter was how CBW could
13 be isolated from the transaction but still gain
14 knowledge of its progress.

15 Q. Who was proposing that CBW be isolated from
16 the transaction?

17 A. Well, it was obviously the seller's side,
18 not the CBW side.

19 Q. Was that you?

20 A. I don't remember.

21 Q. Do you remember any facts that were
22 discussed during the call as to the basis for the
23 seller's desire to have CBW isolated from the
24 transaction?

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1 A. I remember the call as being
2 non-confrontational. So I don't think that -- it
3 was more in the sense of how can this work or how
4 shall this work going forward. And some sort of
5 program was agreed upon where there would be regular
6 telephone calls between CBW and the sellers.

7 Q. And you said there was then a subsequent
8 call just between you and Ed Casas?

9 A. I believe just between Ed Casas and myself.
10 His was the only voice that I heard, and the call
11 was to me alone.

12 Q. Your recollection is that Ed Casas called
13 you back after the first call had ended?

14 A. I believe so, yes.

15 Q. What did Mr. Casas say during that
16 conversation?

17 A. Mr. Casas told me that my e-mail of the
18 previous week was devastating to the career of a
19 young man, Matt Caine. And he asked me if I would
20 please send something that would eliminate that
21 problem for Matt Caine.

22 Q. What did you say in response to that?

23 A. I said I would do so.

24 Q. Getting back to the first call --

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1 MS. HIGGINS: Let's mark that as the
2 next exhibit.

3 (Exhibit 88 marked for identification.)

4 (Document exhibited to witness.)

5 Q. Is this the e-mail that you sent after your
6 subsequent telephone conversation with Ed Casas?

7 A. Yes.

8 Q. Is there anything that you said in this
9 e-mail that is untrue?

10 A. So long as what Matt Caine said that he had
11 said and done with respect to both KeyBank and Epoch
12 was true, then what I said here was true.

13 Q. I'm showing you what was marked as Exhibit
14 22 at Barry Freid's deposition.

15 (Document exhibited to witness.)

16 Q. You see that this is an e-mail from Matt
17 Caine dated June 4, 2004, 5:43 p.m. So this would
18 follow e-mail that we just discussed as Exhibit 8 --
19 excuse me, Exhibit 88. And this was an e-mail that
20 Matt Caine sent to you on June 4th at 5:43 p.m., to
21 you and to others; do you see that?

22 A. I do.

23 Q. Mr. Caine says in here, "We appreciate
24 everyone taking the time to join the call and

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<p style="text-align: right;">Page 122</p> <p>1 providing valuable input." He then goes on to say, 2 "The positive comments from Steve, Barry and Frank 3 regarding CBW's performance and contributions to 4 date were appreciated." Do you see that? 5 A. Yes. 6 Q. So the comments that Barry and Frank made 7 must have been made during the first call, correct? 8 A. Correct. 9 Q. Do you remember what comments Barry and 10 Frank made regarding CBW's performance? 11 A. I don't. 12 Q. You see in point five -- well, let me say 13 this. He then goes on to say, "Going forward, TPG 14 and CBW have agreed to the following rules of 15 engagement to complete this transaction." Then he 16 identifies five points. Reading those five points, 17 are there any of those points that you disagree with 18 in terms of what was agreed on during that call? 19 A. I don't remember what was agreed on during 20 the call. I have no reason to believe that any of 21 these were not as discussed in the call. 22 Q. You see point five, it says, "Ed Casas will 23 contact KeyBank to inquire as to any flexibility in 24 negotiations regarding the net distributable</p>	<p style="text-align: right;">Page 124</p> <p>1 KeyBank Financed Facilities and the closing, did 2 anyone from CBW, Matt Caine, Matt Ryan, Ed Casas, 3 ever tell you that KeyBank had assured CBW that CBW 4 would get paid? 5 A. No. 6 Q. Did you ever have any discussions with 7 anyone at KeyBank about that issue, about whether 8 assurances had been given to CBW that it would be 9 paid? 10 A. No. 11 Q. Have you had any discussions from the date 12 this lawsuit was filed to the present with 13 Mr. O'Connell or anyone else representing KeyBank as 14 to whether in fact KeyBank made -- gave such 15 assurances? 16 A. Yes. 17 Q. Can you tell me what the response was -- 18 strike that. 19 Can you tell me what KeyBank's attorneys 20 have told you about that issue? 21 A. They say it never happened. 22 Q. Did you attend a meeting at Goodwin, Procter 23 & Hoar in the middle of July of 2004 at which Epoch 24 made a presentation regarding its due diligence?</p>
<p style="text-align: right;">Page 123</p> <p>1 proceeds of this transaction. Ed will communicate 2 his findings back to Steve Gordon." Do you see 3 that? 4 A. Yes. 5 Q. Do you recall that Mr. Casas did in fact do 6 that? 7 A. I believe he did. 8 MS. HIGGINS: Mark that as the next 9 exhibit. 10 (Exhibit 89 marked for identification.) 11 (Document exhibited to witness.) 12 Q. Mr. Gordon, this Exhibit 89, this is a copy 13 of an e-mail that you sent the same day, 5:14 p.m. 14 to Ed Casas and Matt Caine that says, "Ed, thanks 15 for putting in a good word with Steve Dunham." So 16 does this reflect that in fact Ed did call 17 Mr. Dunham and relay that back to you? 18 A. I think perhaps he did. 19 Q. Then says, "Madeline and I have now reached 20 an agreement, which will be signed on Monday." Do 21 you see that? 22 A. Yes. 23 Q. Between the time -- between the time period 24 you were first retained in connection with the</p>	<p style="text-align: right;">Page 125</p> <p>1 A. Yes. 2 Q. Is your memory generally consistent with the 3 testimony we've already heard, that Epoch had a 4 Power Point presentation that they gave and that, 5 that Power Point presentation concluded with Epoch 6 announcing that it was reducing the purchase price? 7 A. Yes. 8 Q. And following the Epoch Power Point 9 presentation, do you recall that there were 10 subsequent meetings at Goodwin, Procter & Hoar's 11 office where Epoch was not present? 12 A. Immediately following? 13 Q. Yes. 14 A. Yes. 15 Q. Okay. Do you recall that a representative 16 of CBW was at the meeting? 17 A. Yes. 18 Q. That was Matt Caine? 19 A. I believe so, yes. 20 Q. That was the first time you had met 21 Mr. Caine? 22 A. Yes. 23 Q. Did Mr. Caine -- do you remember Mr. Caine 24 having, making any comments either in the larger</p>

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1 group session or any smaller group session about
2 Epoch's presentation or Epoch's due diligence
3 results?

4 A. No.

5 Q. Do you remember Mr. Caine commenting on
6 whether or not the proposed reduction in purchase
7 price was fair or unfair?

8 A. I don't.

9 Q. Immediately after the Power Point
10 presentation and Epoch announcing -- let me ask this
11 question.

12 Do you remember that Epoch actually had
13 a specific number in mind as to the revised purchase
14 price?

15 A. They certainly did have a number in mind.

16 Q. And they shared that with those present?

17 A. Oh, yes.

18 Q. Was it immediately after that, that there
19 were sort of -- that there was a meeting where Epoch
20 wasn't present?

21 A. Yes, in the very same room, Epoch and Matt
22 Caine left the room leaving the representatives of
23 the sellers and KeyBank in the room.

24 Q. Do you remember who asked Mr. Caine to leave

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1 A. I don't know.

2 Q. Now, after Epoch and Mr. Caine left the
3 room, what was the discussion? What was the nature
4 of the discussion?

5 A. KeyBank was asked what they wanted to do
6 with respect to the reduction in the purchase price.
7 Because even at the 37 million dollars, KeyBank had
8 to take a discount of the full amount that it was
9 owed. So the question was whether KeyBank was
10 willing to take a further discount. And obviously
11 the additional money that was going to be split
12 between KeyBank and the Freid family evaporated. So
13 the only question was whether KeyBank would accept
14 what would be left from the reduced Epoch offer.

15 Q. What was KeyBank's response, do you
16 remember?

17 A. They were noncommittal. They wanted the
18 sellers to negotiate with Epoch to see if the
19 offered purchase price could be increased before
20 they made their decision.

21 Q. Did the sellers agree to do that?

22 A. Within a day or two they did.

23 Q. What was the response of the sellers at the
24 meeting that day?

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1 the room?

2 A. I don't remember.

3 Q. You don't remember?

4 A. I don't remember. Might well have been me,
5 but I don't recall.

6 Q. After Epoch and Mr. Caine left the room, do
7 you remember who was still present in the room?

8 A. The seller representatives and the KeyBank
9 representatives.

10 Q. Who were the Key representatives?

11 A. Madeline Kauffman, Steve Dunham and Rich
12 Marota, M-A-R-O-T-A.

13 Q. When you said the seller representatives,
14 who was there representing the sellers?

15 A. I believe John McCullough was there. I
16 think Mark Tobin was there. Barry Freid was there.
17 I think Gerry Freid was there, and Frank Barker was
18 there.

19 Q. Who is Mr. Barker employed by?

20 A. I don't know.

21 Q. Does Mr. Tobin -- I mean, I understand that
22 he has an ownership interest in the facilities. Did
23 he -- was he in an employment relationship, do you
24 know, with any of the facilities?

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1 A. "That's all there is, no more. We've given
2 you our final offer, but maybe we should talk."

3 Q. Okay. So when you said "that's all there
4 is," is that something Epoch was saying?

5 A. Yes.

6 Q. When KeyBank asked if the sellers would
7 negotiate with Epoch, did the sellers agree to do
8 that, that day?

9 A. Yes.

10 Q. And there were actually further discussions
11 with Epoch that day about bumping the purchase price
12 up?

13 A. I don't think so.

14 Q. Did anyone -- when the seller's
15 representatives and KeyBank's representatives were
16 in the room together, was anyone scratching out on a
17 legal pad or cocktail napkin, you know, the numbers
18 and how it was going to work and whether it was
19 going to work?

20 A. Not to my recollection. I think the
21 conversation was very brief.

22 Q. Do you remember -- I'm handing you back
23 Exhibit 21. And remember that in paragraph six,
24 there were identified in some of the sub paragraphs

<p style="text-align: right;">Page 130</p> <p>1 following paragraph six certain obligations 2 including the payment due to CBW, the payment due to 3 the Commonwealth, I think the payment due to 4 Wallerstein was in there. Do you remember any 5 discussion following this meeting with Key where the 6 KeyBank's representatives and the seller's 7 representatives were together as to those 8 obligations and whether they could be satisfied at 9 the reduced purchase price? 10 A. I don't recall anything that specific. 11 Q. Okay. At any time after, do you remember 12 during that meeting any reference to CBW and the fee 13 that was due? 14 A. No. 15 Q. Do you know what Mr. Caine was doing while 16 you were meeting? Was he still there? Had he left? 17 A. When I opened the door or when the door was 18 opened -- actually, when I walked out the door after 19 this brief meeting with KeyBank, Mr. Caine was 20 sitting in the reception area talking to Larry 21 Gerber. 22 Q. Was there any -- did you have any 23 discussions with Mr. Caine at that time as to what 24 was going to occur next?</p>	<p style="text-align: right;">Page 132</p> <p>1 Q. Who had those discussions? 2 A. I had them with Andy Sucoff. 3 Q. What was the substance of those discussions? 4 A. The dollar amount of the purchase price. 5 Q. Do you remember in terms of those 6 discussions, were you -- you were obviously 7 advocating for a higher purchase price? 8 A. Yes. 9 Q. Were you advocating for a higher purchase 10 price based on any specific argument or disagreement 11 with what Epoch had put on in its Power Point 12 presentation? 13 A. No. 14 Q. Was the nature of the discussion more that 15 they had to raise the purchase price or the deal 16 wouldn't go? 17 A. Yes. 18 Q. Did you -- in the context of those 19 discussions with Andy Sucoff, did you ever disclose 20 to him the amount of the fee that was going to be 21 due to CBW? 22 A. I don't think that ever came up. 23 Q. Do you recall whether Epoch -- strike that. 24 In your conversations with Sucoff, do</p>
<p style="text-align: right;">Page 131</p> <p>1 A. Not that I recall. 2 Q. Was there -- did the seller's 3 representatives then have any further discussion 4 with Epoch that day that you can recall? 5 A. I don't believe so. 6 Q. During the meeting with the three KeyBank 7 representatives that you identified, do you remember 8 any sense as to who was -- having a sense as to who 9 was calling the shots on the KeyBank side in terms 10 of the request that KeyBank take less? 11 A. Yes. 12 Q. Who was that? 13 A. Mr. Marota. 14 Q. Did you ask him for a business card or have 15 an understanding of what his position was? 16 A. The answer to the first question is I don't 17 remember whether I asked him for a business card. 18 But my understanding of his position was that he was 19 Steve Dunham's immediate superior. 20 Q. Following the meeting that day, the July 21 13th meeting, I think you said that in the next 22 couple -- over the next couple of days there were 23 some discussions with Epoch? 24 A. Yes.</p>	<p style="text-align: right;">Page 133</p> <p>1 you recall suggesting to him a figure that was 2 absolutely essential to make the deal happen? 3 A. I'm sure I did. 4 Q. Do you remember that was a figure that Epoch 5 ultimately went up to? 6 A. No, I'm sure they went up to something less 7 than that. 8 Q. Do you recall how much less? 9 A. My memory is that I asked -- the offer at 10 the July meeting I think was 32 million dollars or 11 it might have been 31 and a high number of hundreds 12 of thousands of dollars. And I asked him to 13 increase it I believe to 32 million seven hundred 14 fifty thousand dollars. Again, this is from memory, 15 but I think we're in the ballpark. And I think that 16 at 32 million 250 thousand dollars he communicated 17 to me that, that was the end for his client. And 18 that they were willing to walk away for anything 19 more than that. 20 Q. During that same period were you also having 21 discussions with KeyBank to try to get them to take 22 less? 23 A. Yes. 24 Q. Were those with Madeline Kauffman?</p>

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1 A. Yes, always.

2 Q. Was there a reason you didn't communicate
3 with this guy Marota?

4 A. I'm a lawyer.

5 Q. I was forgetting he wasn't a lawyer. In the
6 context of those discussions, did Madeline Kauffman
7 ever say that at a certain amount, Key would forego
8 the deal?

9 A. Sure.

10 Q. Did she ever tell you what that amount was?

11 A. You know, these are negotiations. And
12 everybody says "that's my bottom line," and the
13 bottom line never somehow quite seems to be the
14 bottom line. But it was -- it was a three-way
15 discussion trying to get Epoch to pay more,
16 obviously, which would have made things very easy as
17 they were at the 37 million dollar level. But the
18 discussions I had with Madeline Kauffman were that
19 there were certain things that had to be paid, and
20 would KeyBank accept the balance.

21 Q. What were the things that had to be paid?

22 A. One of them, I don't know whether it was the
23 first one we discussed, but I know it's the one you
24 were interested in, one of them was CBW, one of them

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1 was the Commonwealth of Massachusetts recoupment,
2 which was essentially an encumbrance on the
3 property, and I think they understood that. One was
4 the Beaver Builders' amount that was still
5 outstanding at that time. The incentive fee to
6 Mr. Wallerstein. I don't know if there were any
7 others.

8 Q. Now, did Beaver Brook, did they have some
9 sort of -- I'm no expert in any of this, but did
10 they have some kind of lien on the property as a
11 result of the amount that was owed to them?

12 A. I don't believe so. It's possible,
13 because -- I don't know anything about the real
14 estate title. So it's possible that they had some
15 sort of mechanics lien, but I don't know that.

16 Q. Prior to Epoch even surfacing, and I think
17 you said you had been having some negotiations with
18 Key prior to the whole process beginning with the
19 letters of intent and things like that; is that
20 right, in terms of keeping things going until the
21 transactions could happen?

22 A. I first got involved --

23 Q. This might be a simpler question. Prior to
24 Epoch making even its initial indication of

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1 interest, giving a range that went up to something
2 like 37 million, do you recall having any
3 discussions with Madeline Kauffman in terms of
4 trying to work something out as to what Key would
5 take? Before they ever heard this fantastic number
6 of 37 million, do you remember the bank ever saying
7 we need at least X amount?

8 A. I do remember the bank saying we need --
9 well, when I first got involved, I believe it was
10 May of 2003, and at that point the KeyBank Financed
11 Facilities included South Pointe. South Pointe and
12 Cranberry Pointe were covered I believe by a single
13 note. When South Pointe was HUD refinanced, I
14 believe at the end of calendar year 2003, the
15 proceeds were applied to that note. And I remember
16 Madeline Kauffman saying the balance of that note
17 had to be repaid. The balance of the Cranberry
18 Pointe note had to be repaid. And my memory is
19 that, that was 11 million dollars. It might have
20 been a bigger number than that, I don't know. My
21 memory is that it was 11 million, and that was
22 always a number that had to be paid. And as I
23 understood it, the discount was going to come from
24 the Chestnut Hill loan. The Cranberry Pointe loan

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1 was going to be repaid in full.

2 Q. As to the Chestnut Hill loan, again before
3 Epoch came in with this number, did you ever have
4 any discussions with the bank as to the minimum
5 amount they needed in terms of that loan?

6 A. No, I don't think I did.

7 (Exhibit 90 marked for identification.)

8 (Document exhibited to witness.)

9 Q. Mr. Gordon, these two e-mails again are
10 e-mails that were printed out from your computer
11 system?

12 A. Yes.

13 Q. And you see on the bottom e-mail you're
14 relaying to Andy Sucoff that -- you say, "Key and
15 The Pointe Group have both compromised to make the
16 deal happen." Do you recall at that point in time,
17 this was two days after that July 13th meeting,
18 whether KeyBank had in fact compromised its
19 position?

20 A. KeyBank had agreed that it would take less.

21 Q. You also say that The Pointe Group has
22 compromised. What did you mean by that?

23 A. The money that was going to the Freid family
24 was gone.

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<p style="text-align: right;">Page 138</p> <p>1 Q. It says, "We are still 250 thousand dollars 2 short, and we have asked Matt Caine of CBW to reduce 3 the commission from one million 50 thousand to eight 4 hundred thousand," correct? That's what it says in 5 this e-mail? 6 A. Yes. 7 Q. Was it you that asked Matt Caine to do that? 8 Did you relay that request to Matt Caine? 9 A. I don't remember. 10 Q. The amount that's reflected there, one 11 million 50 thousand, that was based on the new 12 purchase price? 13 A. Yes. 14 Q. And at the point where you relayed this 15 e-mail to Andy Sucoff, it's fair to say that you 16 still expected that CBW would still receive this 17 fee? 18 A. Yes. 19 Q. At the end of the e-mail you say, "There are 20 now three choices: One, CBW reduces 250 thousand; 21 two, Epoch pays 250 thousand more or no deal." Do 22 you recall which of those things happened? 23 A. None of the three. 24 Q. How was it that the deal was able to go</p>	<p style="text-align: right;">Page 140</p> <p>1 A. Yes. 2 Q. Are these e-mails, would it be fair to say 3 that these e-mails pertain to the issue we were 4 talking about, that Epoch had difficulty dealing 5 with Barry Freid? 6 A. Yes, or perceived difficulty dealing with 7 Barry Freid. 8 Q. Did anyone from KeyBank ever express to you 9 that they had any difficulties with Barry Freid? 10 A. I don't think so. 11 Q. How about CBW, did anyone from CBW ever 12 communicate to you any concerns or complaints about 13 Barry Freid? 14 A. I don't think so. 15 Q. Mr. Gordon, do you recall that in late 16 August or early September of 2004, I think you 17 alluded to this earlier in your deposition 18 testimony, that the issue of an encroachment at the 19 Chestnut Hill property arose? 20 A. Yes. 21 Q. And ultimately did that encroachment issue 22 result in an increased -- result in the buyer 23 requiring an increased escrow at the time of the 24 closing?</p>
<p style="text-align: right;">Page 139</p> <p>1 forward? 2 A. KeyBank took less. So I suppose there was 3 actually a fourth choice. 4 Q. Do you remember after -- strike that. 5 Is it your memory that within say a week 6 of the July 13th meeting that there was agreement on 7 a new purchase price? 8 A. Approximately, yes. 9 Q. And between that time and let's say through 10 the end of August, is it fair to say there weren't 11 any further changes to the purchase price? 12 A. I think that is fair to say. 13 Q. And would it also be accurate that during 14 that time period, everybody was completing what 15 needed to be done in order for the transaction to 16 close? 17 A. I believe so, but that part of the 18 transaction was invisible to me. 19 (Exhibits 91 and 92 marked for 20 identification.) 21 (Documents exhibited to witness.) 22 Q. Mr. Gordon, these two e-mails, 91 and 92, 23 these were both printed from your computer system, 24 correct?</p>	<p style="text-align: right;">Page 141</p> <p>1 A. No. 2 Q. How was that issue ultimately resolved? 3 A. The buyer agreed to close over the title 4 defect for a seven hundred thousand dollar credit 5 against the purchase price. 6 Q. It would be fair to say that you have no 7 information to suggest that CBW knew about that 8 encroachment at any time prior to it becoming public 9 knowledge to everyone? 10 A. That would be fair. 11 Q. Do you also recall that in September of 12 2004, fairly close to the closing date, an issue 13 arose with respect to a grand jury subpoena being 14 served on representatives of the facility in Cape 15 Cod? 16 A. Yes. 17 Q. And that issue also was brought to the 18 buyer's attention, correct? 19 A. Correct. 20 Q. Do you recall the buyer requesting any 21 accommodation in light of that issue having arisen? 22 A. Yes. 23 Q. What was that? 24 A. They wanted to increase the amount of the</p>

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1 escrow and increase the time before there would be a
2 release of the escrow.

3 Q. As you sit here today, do you know whether
4 that escrow has ever been released?

5 A. I believe it has not.

6 Q. And again, with respect to that issue,
7 obviously CBW had no involvement in that issue
8 arising or being brought to Epoch's attention?

9 A. Correct.

10 Q. Do you recall that shortly before the
11 closing, there was a conference call among you and
12 Madeline Kauffman and Epoch's counsel as to a final
13 resolution of what the purchase price would be in
14 light of these outstanding issues?

15 A. Yes.

16 Q. And during that conference call, do you
17 recall there being any discussion as to whether
18 there was sufficient funds to pay CBW?

19 A. I don't recall any.

20 Q. Do you recall during that telephone
21 conversation any discussion as to specific
22 obligations that had to be paid in order for the
23 transaction to close?

24 A. I don't recall that, either.

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1 Q. What do you recall the discussion being in
2 terms of who had to do what to make the numbers
3 work?

4 A. I recall the deal was that KeyBank would
5 take what was left after the list of things that had
6 to be paid from the closing proceeds. And if the
7 buyer was going to reduce the purchase price by
8 seven hundred thousand dollars, that was going to
9 reduce KeyBank's receipts by a like amount.

10 Q. So at the conclusion of that conference
11 call, it's your recollection that the understanding
12 was that -- well, let me ask this.

13 At the conclusion of that conference
14 call, was there agreement on what the price purchase
15 would be?

16 A. I'm not sure. I'm not sure when the
17 agreement actually took place.

18 (Exhibit 93 marked for identification.)

19 (Document exhibited to witness.)

20 Q. Mr. Gordon, this e-mail, which appears to be
21 again printed from your computer system and it's
22 dated September 27, 2004 from you to Madeline
23 Kauffman, does this e-mail reflect the agreement
24 that was reached at that conference call?

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1 A. I believe it does.

2 Q. And you see that this is cc'd to John
3 McCullough and Peter Haley. Do you know if you sent
4 a copy of this e-mail or a similar e-mail to anyone
5 at Epoch to confirm that this was the deal?

6 A. I don't know. I generally do not use bcc's.
7 Although I think my system a bcc would show up. But
8 I don't use that. So --

9 Q. Okay, let me ask this question. On that
10 conference call where there was this discussion
11 about how the numbers would work, was Epoch part of
12 that call or was that just a call between KeyBank
13 and the sellers?

14 A. I believe just between KeyBank and the
15 sellers. I believe it's actually just among
16 counsel.

17 Q. You and Madeline Kauffman?

18 A. And John McCullough.

19 Q. There's a reference in here, it says, "We
20 have agreed that the KeyBank payoff, formerly 29
21 million, 925 thousand plus a 75 thousand dollar
22 note, will now be 29 million, 425 thousand dollars
23 and no note." Do you see that?

24 A. Yes.

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1 Q. What was the note that was being omitted?

2 A. KeyBank had insisted at some point that they
3 had to have 30 million dollars. That was a bottom
4 line. When there wasn't enough money for that, I
5 think Barry Freid said, "I'll sign a note for 75
6 thousand dollars."

7 Q. So KeyBank was now moving off that
8 requirement?

9 A. Moving off the 30 million dollars.

10 Q. Do you recall during that conference call on
11 September 24th, at that late stage of the game, do
12 you recall whether Madeline Kauffman was still
13 insisting that KeyBank would walk away from the deal
14 if they didn't get a certain amount?

15 A. Well, that's always the way negotiations
16 are. You know, it's sort of like union and
17 management. We'll strike. We'll close down. I
18 don't think it was again confrontational in any
19 sense. It was just this is the limit of our
20 authority or something of that sort.

21 Q. During that call, did Madeline Kauffman say
22 to you, you know, "I can't make this decision. I'm
23 going to have to get back to you," or did it appear
24 as though she would be able to make this agreement

<p style="text-align: right;">Page 146</p> <p>1 to go down to the 29 million 425 without checking 2 with anyone else? 3 A. I believe that she had authority. I guess 4 it's possible that her client was on the phone. I 5 have a vague recollection this was just among 6 counsel, but I think that she had authority. I also 7 think that during that Friday, there were numerous 8 telephone calls where Madeline would convey the 9 bank's position to me. I would say, "Well, I can't 10 do that." I would talk with client representative. 11 She would I'm sure do likewise, and we would go back 12 and forth. I think this went on for -- the e-mail 13 says, "The hour was late for all of us on Friday." 14 So I think it went on well into the evening. I 15 don't mean two a.m., but well into the evening, 16 before the process of my client says this is all I 17 have authority for and so on and so forth reached 18 the agreement at the 29 million 425. 19 Q. Well, in terms of what -- I can understand 20 KeyBank was negotiating down from a number. Now, I 21 guess what I'm a little more confused about is what 22 you would be negotiating, because as I understand 23 it, your clients weren't going to get any money. 24 So, in terms of what you were saying to Madeline</p>	<p style="text-align: right;">Page 148</p> <p>1 Q. In terms of the position of your clients 2 that you were conveying to Madeline Kauffman, who 3 was conveying that information to you to be conveyed 4 to Madeline Kauffman? 5 A. I can't answer that. 6 Q. Are you aware that in -- strike that. 7 We've talked about the closing in this 8 case, the closing occurring on September 30th of 9 2004, correct? 10 A. Yes. 11 Q. And prior to the closing, were you aware 12 that CBW had sent an invoice and wiring 13 instructions? 14 A. I don't think so. 15 (Exhibit 94 marked for identification.) 16 (Document exhibited to witness.) 17 Q. Mr. Gordon, this document marked as Exhibit 18 94 appears to be an e-mail printed out by Matt 19 Caine. You see that the e-mail below is an e-mail 20 from Matt Caine to you on September 28, 2004, two 21 days before the closing. You see that he says, 22 "Steve, thank you for the update yesterday, and 23 congratulations to you on bringing this transaction 24 on an intent to close." Do you recall what the</p>
<p style="text-align: right;">Page 147</p> <p>1 Kauffman, I guess I'm wondering what were you -- let 2 me ask it this way. 3 During that day on Friday, you said that 4 there were various communications between you and 5 Madeline Kauffman. What was it that you were 6 authorized by your clients to convey to Madeline 7 Kauffman? 8 A. What was I authorized to or what did I 9 convey to her? 10 Q. What did you convey to her? 11 A. I told her that we were willing to walk away 12 from the deal and pursue the HUD refinancing. 13 Q. Okay. Unless what? 14 A. Unless they reduced the amount that was 15 necessary to pay off the bank. 16 Q. But throughout that day, was it always going 17 to be the case, given the amount of money involved, 18 that your clients were going to get nothing? 19 A. Yes. 20 Q. So were you conveying to Madeline Kauffman 21 that the bank had to bring down what it was going to 22 take, because your clients weren't going to actually 23 bring money to the closing? 24 A. Yes.</p>	<p style="text-align: right;">Page 149</p> <p>1 update was? 2 A. I don't. 3 Q. He then goes on to say, "Can you please 4 share with us who will be overseeing the 5 administrative side to the transaction and where the 6 closing was to take place or if it's to be handled 7 remotely." Then he asks you if you anticipate a 8 closing for this Thursday. And you sent an e-mail 9 back to him saying, "I don't know the answers to 10 your question. I asked many of the same this 11 morning but was in a deposition all day today." Do 12 you see that? 13 A. Yes. 14 Q. Was it correct to say that on this day, 15 September 28th, you didn't know whether the closing 16 was going to be on September 30th? 17 A. That's correct. 18 Q. Just looking at that exhibit again, you say 19 I asked many of the same questions this morning. 20 Who did you ask about that? 21 A. I don't remember. 22 (Exhibit 95 marked for identification.) 23 (Document exhibited to witness.) 24 Q. Mr. Gordon, this document marked as Exhibit</p>

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1 95, which was produced by Goodwin Procter in
 2 response to the subpoena served on them. You see
 3 that on the first page there's a message about
 4 two-thirds of the way down from Laurie Woodward to
 5 you. "I believe you're coming over for the closing.
 6 If so, I wanted you to have this information." Then
 7 she sends you what appears to be a message that she
 8 sent the prior evening with details of the closing.
 9 Then you respond back to her. You say, "I will be
 10 coming at some point." When you received this
 11 e-mail from Laurie Woodward, did you forward this on
 12 to Matt Caine as it answered some of the questions
 13 he had posed to you?

14 A. I don't believe I did.

15 Q. Did you call Matt Caine and tell him, "Now I
 16 know where the closing is, it's tomorrow and it's at
 17 Goodwin Procter"?

18 A. I doubt it.

19 (Exhibit 96 marked for identification.)

20 (Document exhibited to witness.)

21 Q. Mr. Gordon, you see this series of e-mails
 22 that were sent between you and Madeline Kauffman the
 23 night before the closing and the last one from her
 24 to you is at 10:46 p.m.?

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1 A. I see that, yes.

2 Q. Do you know whether, at the time the night
 3 before the closing these e-mails were being
 4 exchanged, whether you were at your office or at a
 5 home computer?

6 A. I was at a home computer. Well, I was out
 7 that night. So I didn't see the e-mails until very
 8 late. I didn't see the first of the e-mails until
 9 my response at ten p.m., after ten p.m.

10 Q. And you see that at the top message from
 11 Madeline Kauffman to you says, "I understand from
 12 John McCullough that everything is set for
 13 tomorrow." Do you see that?

14 A. Yes.

15 Q. That was on 10:46 p.m. on the night before
 16 the closing?

17 A. Correct.

18 Q. Then the next morning you at some point
 19 arrived at Goodwin Procter for the closing, correct?

20 A. Yes.

21 Q. And between getting Madeline Kauffman's
 22 e-mail and arriving at Goodwin Procter for the
 23 closing, did you have any conversations with anyone
 24 or I should say communications with anyone, either

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1 by e-mail or by telephone or in person, concerning
 2 any subject that was going to be addressed at the
 3 closing?

4 A. I don't believe so.

5 Q. So you get this e-mail from Madeline
 6 Kauffman, and it says, "I understand from John
 7 McCullough that everything is set for tomorrow,"
 8 correct?

9 A. Correct.

10 Q. And then the next morning you arrive at
 11 Goodwin Procter for the closing?

12 A. Yes.

13 Q. And between those two, you had, had no
 14 communications with anyone, including anyone on the
 15 seller's side, regarding the closing?

16 A. I don't believe I did. I may have had a
 17 conversation with Andy Sucoff, because at that point
 18 we hadn't concluded on the extension of time for the
 19 escrows to be outstanding. And he might even have
 20 been asking for a little bit more money in escrow.
 21 I don't know. The escrows for some reason had not
 22 been determined.

23 Q. Did you go -- do you remember if before
 24 going to Goodwin, Procter & Hoar for the closing,

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1 whether you went into your office in the morning?

2 A. Yes, I did.

3 Q. So if you had communications with Andy
 4 about the escrows, it would have happened then?

5 A. Might have been on a cell phone or on the
 6 way in. That's a possibility. Or it would have
 7 been in my office. The fact that there don't appear
 8 to be any e-mails leads me to believe that either --
 9 certainly there was no e-mail, and maybe there was
 10 no communication until I actually arrived at Goodwin
 11 Procter mid morning.

12 Q. When you arrived at Goodwin, Procter & Hoar
 13 for the closing, was it your understanding that CBW
 14 was going to be paid out of the sale proceeds?

15 A. I had no understanding. I can't say that I
 16 was thinking about that at all.

17 Q. Well, we've looked at some exhibits, and we
 18 can certainly pull them out, where you had
 19 calculated the fees that were due to CBW?

20 A. Yes.

21 Q. Correct?

22 A. That is correct.

23 Q. And between the time that you did those
 24 calculations and the time that you arrived at the

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<p style="text-align: right;">Page 154</p> <p>1 closing, had your belief changed at all as to 2 whether CBW was going to be paid? 3 A. No, it had not. So I may have misanswered 4 your question. My understanding was nothing 5 specific to CBW, but with respect to the listed 6 items of CBW, Medicaid recoupment, we had eliminated 7 Stanley Wallerstein. Beaver Builders had been paid 8 previous to the closing, not out of the proceeds. 9 My understanding was that the sellers were walking 10 away with nothing. But certainly that they weren't 11 contributing anything. 12 Q. So going back to Exhibit 96. When you asked 13 Madeline Kauffman, you said is there enough money, 14 was that question whether there was enough money to 15 pay Key what it had agreed to take and these other 16 obligations? 17 A. Absolutely. I wasn't for some reason copied 18 on the closing statement. If you see, on the second 19 page of Exhibit 96, when I finally got back to my 20 computer, I left the office maybe at 4:30 to go out. 21 When I got back to the office -- to my home that 22 evening, I turned on the computer and I saw these 23 earlier messages. I said, "Perhaps I missed it, but 24 I saw no draft settlement statement today. When did</p>	<p style="text-align: right;">Page 156</p> <p>1 Q. Had you had any discussions with Madeline 2 Kauffman or Steve Dunham -- well, you wouldn't have 3 had discussions with Steve, but with Madeline 4 Kauffman as to whether she was going to be there? 5 A. I may have asked her whether she was coming. 6 Q. Do you remember what her response was? 7 A. I don't. 8 Q. When you arrived at the closing, did you 9 then review settlement statements? 10 A. No. 11 Q. What did you do during the closing? 12 A. When I arrived -- I don't want -- again, I 13 don't want to split hairs, but it depends on what 14 you mean by closing. If closing is signing of 15 documents, I did not participate in that. When I 16 arrived at Goodwin Procter on September 30th, there 17 was a large conference room about the size of this 18 conference room filled with papers on this. Again, 19 I'm not a transactional lawyer, but they have those 20 accordion-type things with papers stretching from 21 one end of a gigantic conference table to the other. 22 My clients were not in that room. The sellers were 23 in another conference room diagonally across the 24 hall, and I went into that room. And shortly</p>
<p style="text-align: right;">Page 155</p> <p>1 you send it? Can you please resend?" Of course 2 everybody but Madeline and me were maybe asleep by 3 then. But Madeline did not forward it to me, 4 either. 5 Q. Even if you didn't see the settlement 6 statements that were being circulated that day, had 7 you seen any prior drafts of settlement statements? 8 A. No. 9 Q. When you arrived at Goodwin, Procter & Hoar 10 had folks started signing documents yet or -- 11 A. No. 12 Q. Do you remember whether the Freids were 13 already there when you arrived? 14 A. They were. 15 Q. And John McCullough was there as well? 16 A. Yes. 17 Q. Do you remember during -- on the day of the 18 closing, whether anyone from KeyBank was at the 19 closing? 20 A. I don't recall anybody from KeyBank being 21 there. 22 Q. Did you expect to see someone from KeyBank 23 at the closing? 24 A. I don't know whether I had any expectation.</p>	<p style="text-align: right;">Page 157</p> <p>1 thereafter, John McCullough and I left that room to 2 have conversations with Andy Sucoff on the escrows, 3 which was the only open issue that I was working on. 4 I was working on KeyBank, the encroachment and the 5 escrows or the requests for additional escrow 6 arising from the Attorney General's investigation. 7 And John McCullough and I spoke with Andy Sucoff. I 8 believe we went back into the room with the clients. 9 We then left and concluded an agreement on the 10 escrows with Andy Sucoff. And at that point, I 11 think it might have been another half an hour or 45 12 minutes after we concluded the agreement, obviously 13 somebody has to then put pen to paper. I don't 14 remember actually reviewing the escrow documents. 15 John McCullough and his two people did that. And 16 then everybody moved into the closing room. By this 17 time, it was well after one o'clock in the afternoon 18 is my memory. And I brought Georgia Freid into the 19 closing room. This was very emotional for her, 20 because her late husband had built Chestnut Hill. 21 It was intended to be the crown jewel. It was very 22 difficult for her. I actually quite literally held 23 her hand for a few minutes in the closing room. And 24 I asked her if everything was okay. She was fine,</p>

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1 and her sons were there. And Mark Tobin, whom I
2 think she has a nice relationship, was there. I
3 left.

4 Q. So you didn't stay while she actually signed
5 the documents?

6 A. I did not.

7 Q. Now, in connection with the discussions with
8 Andy Sucoff on the escrows, did you review the
9 settlement sheet to make sure they accurately
10 reflected what you had agreed on in terms of the
11 escrows?

12 A. No.

13 Q. So even if you weren't given a copy of a
14 settlement statement, it's your testimony that
15 through the day you were at Goodwin, Procter & Hoar,
16 you never reviewed any draft settlement statements?

17 A. I never saw a settlement statement. I
18 didn't even know one had been prepared, other than a
19 draft that was sent that no one shared with me. But
20 if it was all set, it was all set. The closing
21 wasn't my responsibility.

22 Q. In terms of the discussion on the escrows
23 with Andy Sucoff, now those would have been -- there
24 were two escrows that were established, correct?

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1 sale proceeds?

2 A. I don't remember learning that at the time.

3 Q. During the discussions that you had with
4 Andy Sucoff about the escrow amounts, did the
5 subject of CBW's fee come up at all?

6 A. I don't believe so.

7 Q. Did you have discussions while you were at
8 Goodwin, Procter & Hoar with anyone as to whether
9 CBW's fee was going to be paid that day?

10 A. I can't answer that.

11 Q. You're not going to answer the question of
12 whether you had such discussions with anyone?

13 A. I can't answer that.

14 Q. When you left Goodwin, Procter & Hoar after
15 you were in the closing room with Georgia Freid, at
16 the time you left Goodwin, Procter & Hoar, did you
17 have an understanding as to whether CBW's fee was
18 going to be paid that day?

19 A. I can't answer that.

20 Q. While you were at Goodwin, Procter & Hoar,
21 did you have any communications with anyone at CBW?

22 A. No.

23 Q. Did you have communications while you were
24 at Goodwin, Procter & Hoar with anyone at KeyBank?

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1 A. I believe so.

2 Q. And the discussions were what the amount of
3 those escrows would be?

4 A. I'm not sure why there were two escrows.

5 One seemed to be for a purpose that the
6 transactional lawyers well understood, and there was
7 no issue with that. The other one seemed to be the
8 one that they were focusing on with respect to how
9 that would pay for any unanticipated additions
10 arising for the buyer out of the Attorney General's
11 investigation. That's the escrow that was the focus
12 of the discussion among Andy Sucoff, John McCullough
13 and myself the day of the closing.

14 Q. Do you recall whether as a result of those
15 discussions, the amount of the escrow went up or
16 went down or stayed the same?

17 A. I don't know whether the amount went up. I
18 know that the time that it would -- that the money
19 would remain in escrow was lengthened. The amount
20 may have gone up, too, maybe by one hundred thousand
21 dollars. I'm not sure.

22 Q. At any point during the time that you were
23 at Goodwin, Procter & Hoar, did you become aware
24 that CBW's fee was not going to be paid out of the

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1 A. No.

2 Q. What did you do after you left Goodwin,
3 Procter & Hoar?

4 A. I went back to my office for a pre-scheduled
5 meeting, which I believe was either at 2:00 or 2:30.

6 Q. Was that meeting unrelated to --

7 A. Totally.

8 Q. -- the transaction? While you -- do you
9 remember how late you were at the office that night?

10 A. I don't.

11 Q. While you were at the office, either before
12 or after this other meeting, did you have any
13 discussions with anyone from CBW about the
14 transaction or CBW's fee?

15 A. No.

16 Q. Did you have discussions about the
17 transaction with anyone from KeyBank that afternoon?

18 A. No.

19 Q. How about after you left the office that
20 day, did you have conversations with anyone from CBW
21 or KeyBank from home or the car?

22 A. I don't believe so.

23 Q. How about the next morning? I know you
24 testified earlier you remember that you had a

<p style="text-align: right;">Page 162</p> <p>1 telephone conversation with Ed Casas. 2 A. Yes. 3 Q. Do you remember whether Ed called you or you 4 called him? 5 A. I believe he called me. 6 Q. Before Ed Casas called you, had you had 7 conversations with anyone at KeyBank about whether 8 the transaction closed, anything related to the 9 transaction? 10 A. I don't believe so. 11 Q. What did Mr. Casas say when he called you? 12 A. He said, "Are we going to be paid?" 13 Q. What did you say? 14 A. I said, "I'm working on a letter to you." 15 Q. What was his response to that? 16 A. "I don't need a letter. Just tell me 17 whether we're going to get paid or not." 18 Q. What did you say? 19 A. "I'd rather send you a letter." 20 Q. What do you recall happening next in terms 21 of CBW? 22 A. I sent them a letter. 23 Q. Did Mr. Casas call you again after he 24 received the letter?</p>	<p style="text-align: right;">Page 164</p> <p>1 closing statement, because Ed Casas had specifically 2 asked for it. 3 Q. So the call that you had with Andy Sucoff, 4 was that call initiated by you to Mr. Sucoff? 5 A. No. 6 Q. What did Mr. Sucoff say when he called? 7 A. He told me that his client had received a 8 threatening phone call from the broker, and he was 9 agitated because the broker had threatened to get an 10 injunction to stop the transaction. 11 Q. What did you say in response? 12 A. I said, "I'm working on a letter to the 13 broker," and I asked him for a copy of the closing 14 statement. 15 Q. Did you say anything else to Mr. Sucoff? 16 A. I don't recall. 17 Q. Did you tell Mr. Sucoff what was in your 18 letter? 19 A. I don't think so. 20 (Exhibit 97 marked for identification.) 21 (Document exhibited to witness.) 22 Q. Mr. Gordon, the document that's been marked 23 as Exhibit 97, did you send copies of this to anyone 24 other than Mr. Caine? I think I missed a word</p>
<p style="text-align: right;">Page 163</p> <p>1 A. I had a lot of calls that day. I think he 2 did. I think Mr. Casas did call me once more 3 without a lawyer and then once again with a lawyer 4 or maybe just his lawyer. 5 Q. Do you believe that, that day you did have 6 conversations with a lawyer for CBW, whether 7 Mr. Casas was on the call or not? 8 A. I think so. 9 Q. Was that Jeff Marwell? 10 A. I believe it was, yes. 11 Q. And you said you had a lot of calls. Were 12 those calls specific to the issue of whether or not 13 CBW was going to be paid? 14 A. Somewhat. 15 Q. Who were those calls with? 16 A. The only one I can disclose to you is Andy 17 Sucoff. 18 Q. Do you recall when Andy Sucoff called you in 19 terms of your letter? Was it before or after you 20 had sent your letter? 21 A. I don't recall. I do recall -- I don't 22 recall, because I don't remember whether it was 23 while I was working on it or after I had sent it. I 24 remember asking Mr. Sucoff to send me a copy of the</p>	<p style="text-align: right;">Page 165</p> <p>1 there. Did you send copies of this to anyone other 2 than Mr. Caine? 3 A. I don't know whether I e-mailed it 4 simultaneously to Mr. Casas. 5 Q. Did you send this letter to anyone from 6 KeyBank or Epoch? 7 A. I don't believe so. 8 Q. When did you start working on this letter? 9 A. I can't tell you that. 10 Q. Did you show drafts of this letter to anyone 11 before you sent it to Mr. Caine? 12 A. No. 13 Q. Did Gerry Freid specifically authorize you 14 to convey to CBW the number of 782,773 that's in 15 your letter? 16 A. I can't answer that. 17 Q. Well, you say in the first paragraph of your 18 letter that you will conclude with a settlement 19 proposal at Gerry Freid's insistence, correct? 20 A. That's what the letter says. 21 Q. Did Gerry Freid tell you something that he 22 intended for you to convey to CBW? 23 A. I can't answer that. 24 Q. You say in the letter that Mr. Freid sent</p>

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1 you the invoice from CBW. When did you first see
2 that invoice?

3 A. I don't recall.

4 Q. Do you recall that it was in connection with
5 writing this letter?

6 A. I don't remember. I believe so, but I don't
7 remember.

8 Q. In the third paragraph of your letter you
9 say, "To my knowledge, no analytical work at all,
10 let alone acceptable in all respects, has been
11 performed." Do you see that?

12 A. Yes.

13 Q. Is the basis of that statement that you
14 never reviewed any of CBW's work product?

15 A. No.

16 Q. What is the basis of your statement that no
17 analytical work at all has been performed?

18 A. I can't answer that.

19 Q. You go on to say, "I know of no
20 restructuring services rendered nor any meaningful
21 work done on refinancing or raising the capital."
22 Do you see that?

23 A. Yes.

24 Q. Your knowledge that no restructuring

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1 services were rendered nor any meaningful work done
2 on refinancing or raising new capital, is that based
3 on your independent review of any documents?

4 A. I'm sure -- well, I'm not sure. No, I'm not
5 sure if it's based on any review of documents.

6 Q. Did you ever review all of the work product
7 that CBW did and sent to your clients?

8 A. No.

9 Q. In the fourth paragraph of the letter,
10 second sentence says, "In any event, none of the
11 desired objectives of my client to either
12 restructure debt, refinance or raise new capital
13 were even explored." Isn't that inconsistent with
14 the summary of the letters of intent that we looked
15 at that CBW solicited and received?

16 A. I don't think so.

17 Q. The statement that you make at the bottom of
18 the first page carrying over to the second that,
19 "CBW is not qualified to act as a real estate broker
20 in Massachusetts, which is a necessary prerequisite
21 for earning and collecting a brokerage commission,"
22 is that statement based on any legal research that
23 you did?

24 A. I can't answer that.

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1 Q. When did you first conduct any legal
2 research regarding the issue of whether CBW was
3 entitled to collect its fee based on its status as a
4 licensed real estate broker?

5 A. I can't answer.

6 (Exhibit 98 marked for identification.)

7 (Document exhibited to witness.)

8 Q. In this -- Mr. Gordon, this obviously is an
9 affidavit of yours that was signed on January 4,
10 2005.

11 A. Yes.

12 Q. Even though obviously what appears here is
13 the new form of electronic signature, this is an
14 affidavit that you signed?

15 A. Absolutely.

16 Q. Looking at paragraph seven of the affidavit,
17 it refers to an attachment, which I believe is what
18 you previously testified to, the e-mail that you
19 sent to Mr. Casas on October 1st at 12:41 p.m.?

20 A. Correct.

21 Q. And beneath that is an e-mail from Andy
22 Sucoff at 12:19 p.m.?

23 A. Correct.

24 Q. In your e-mail to Mr. Casas, you say, "Ed, I

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1 am forwarding to you the just received closing
2 statement. As you can see the, quote, seller, close
3 quote, was required to pay over two hundred thousand
4 dollars at closing." Do you see that?

5 A. Yes.

6 Q. Have you ever reviewed -- strike that.

7 At the time you had sent this e-mail to
8 Mr. Casas, had you ever reviewed any other draft or
9 version of a closing statement that showed the
10 sellers bringing in excess of a million dollars to
11 the closing?

12 A. No.

13 Q. You then say, the fourth sentence, "I hear
14 that my clients are not the only ones who have
15 threatened." Do you see that?

16 A. Yes.

17 Q. What did you mean when you refer to your
18 clients being threatened?

19 A. I believe that Mr. Casas called them and
20 threatened them.

21 Q. When do you think that happened or what was
22 your understanding?

23 A. I think that happened on the morning of
24 October 1st.

<p style="text-align: right;">Page 170</p> <p>1 Q. What was your understanding as to who 2 Mr. Casas called? 3 A. I think it was Gerry Freid. 4 Q. If you look at the closing statement that's 5 attached to your e-mail and you look at page -- it's 6 schedule seven. It has the closing costs and 7 disbursements. 8 A. Yes. 9 Q. If you look at item number four, broker 10 commission, it says payable to Casas, Benjamin & 11 White, LLP, then it says POC by seller; do you see 12 that? 13 A. Yes, I do. 14 Q. You were at Mr. McCullough's deposition, 15 correct? 16 A. Yes. 17 Q. And you believe you were present when 18 Mr. McCullough testified that he communicated to 19 Andy Sucoff that CBW's fee would be taken care of 20 outside of the closing; do you remember that 21 testimony? 22 A. I don't know if you're exactly 23 characterizing it, but I do remember his testimony. 24 Q. To the best of your knowledge, when</p>	<p style="text-align: right;">Page 172</p> <p>1 agent to The Pointe Group? 2 A. No. 3 Q. Still staying on that schedule, item number 4 five, the escrow for successor liability. 5 A. I'm sorry, that must be the previous page? 6 Q. Yes. Now, is that the escrow that you were 7 having discussions with Andy Sucoff about or was 8 that the escrow in item six? 9 A. I believe it was item six. 10 Q. What's described as the general escrow? 11 A. I think so, because it's a round number, and 12 we were talking round numbers. The other one is 13 obviously a more exact number. 14 Q. As to either of the escrows in items five or 15 six, do you have any information as to whether any 16 funds have been disbursed from those two escrows? 17 A. I don't know. I don't believe so, but I 18 don't know. 19 Q. At any time from the September 30, 2004 20 closing to the present, do you have any knowledge as 21 to whether sales proceeds were distributed to any 22 member of the Freid family? 23 A. You mean from this closing statement? 24 Q. From any money that was either escrowed at</p>
<p style="text-align: right;">Page 171</p> <p>1 Mr. McCullough made that statement or substantially 2 similar statement to Mr. Sucoff, was Mr. McCullough, 3 did Mr. McCullough have authority from one of the 4 clients that you considered to be part of your 5 client group to communicate that statement to Andy 6 Sucoff? 7 A. I can't answer that. 8 Q. You were also present at Gerald Freid's 9 deposition, Barry Freid's deposition and Georgia 10 Freid's deposition, correct? 11 A. Yes. 12 Q. You heard each of those people testify that 13 they had no knowledge of any such statement being 14 communicated to Epoch's counsel until sometime after 15 the closing; do you remember that testimony? 16 A. I don't specifically remember it. 17 Q. If you look at the next page, there's item 18 number seven, payment to settle Medicaid, and 19 there's an amount there 869 thousand 55 dollars; do 20 you see that? 21 A. Yes, I do. 22 Q. After the closing actually occurred, do you 23 have any knowledge as to a check in that amount 24 being sent from the title agent, from the escrow</p>	<p style="text-align: right;">Page 173</p> <p>1 the closing or -- 2 A. I don't believe that the Freid family or any 3 member has received any money from escrows at the 4 closing. 5 Q. On the day after the closing, I think you 6 said you had some conversations with Ed Casas and 7 also with Andy Sucoff. Did you have any discussions 8 with Madeline Kauffman that day? 9 A. I think I may have had discussions with her 10 as well. 11 Q. Do you remember whether she called you or 12 you called her? 13 A. I don't remember which it was. 14 Q. Do you remember that the subject of the 15 conversation or one of the subjects of the 16 conversation was whether or not CBW was going to be 17 paid? 18 A. I think so, yes. 19 Q. Can you tell me with respect to that issue 20 what you said to her and what she said to you? 21 A. I don't remember obviously exactly. But I 22 remember I said to her, "Madeline, you got all the 23 money, and you're the only source." I don't recall 24 her acquiescing.</p>

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1 Q. I'm sorry?

2 A. I don't recall her acquiescing in that.

3 Q. Did she tell you that she called you at the

4 request of anyone else?

5 A. I don't remember her saying that. It's

6 possible, but I don't remember it.

7 Q. At any time from that conversation to the

8 present, have you had any subsequent conversations

9 with Madeline Kauffman about the issue of CBW's fee?

10 A. I think we did, and we may even have had

11 conversation or -- might have had some conversation

12 at the time the complaint was filed, but not since

13 counsel was engaged.

14 Q. At the time the complaint was filed, what do

15 you remember about the communications you had with

16 Madeline Kauffman about the complaint?

17 A. I seem to recall that I got it before she

18 did, and she asked me to send her a copy. I don't

19 remember anything else about it.

20 Q. After the conversations that you had with

21 Andy Sucoff the day after the closing and Mr. Sucoff

22 sending you the closing statement, subsequent to

23 that, have you had any conversations with Andy

24 Sucoff about CBW's fee or this litigation?

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1 A. I don't think I've spoken to him on any

2 subject.

3 Q. Since that conversation?

4 A. Since October 1st. There might have been a

5 conversation -- October 1st was a Friday. There

6 might have been a conversation early the following

7 week, but I don't have a specific recollection of

8 it.

9 Q. I just have a few more questions.

10 Mr. Gordon, at any point on the day of the closing

11 or on any of the days leading up to the closing, had

12 Gerald Freid ever authorized you to convey any

13 instructions to Mr. McCullough with respect to CBW's

14 fee being taken care of outside of the closing?

15 A. I can't answer that.

16 Q. At any point on the day of the closing or

17 any of the days leading up to the closing, had Barry

18 Freid authorized you to convey any instructions to

19 Mr. McCullough that CBW's fee would be dealt with

20 outside of the closing?

21 A. I can't answer that.

22 Q. Would you give the same answer to that same

23 question with respect to Georgia Freid having

24 authorized you to give those instructions?

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1 A. I would.

2 Q. Would you answer the same way with respect

3 to Mark Tobin authorizing you to convey instructions

4 to Mr. McCullough?

5 A. Yes.

6 Q. And would you answer that question the same

7 way if I was asking about Frank Barker having

8 authorized you to convey those instructions to

9 Mr. McCullough?

10 A. Yes.

11 Q. At any point on the day of the closing or on

12 any of the days leading up to the closing, did

13 Gerald Freid authorize you to convey to Andy Sucoff

14 that CBW's fee would be dealt with outside of the

15 closing?

16 A. I can't answer that.

17 Q. Is your answer the same with respect to

18 Barry Freid having provided you with that

19 authorization?

20 A. Yes.

21 Q. Georgia Freid?

22 A. Yes.

23 Q. Mark Tobin?

24 A. Yes.

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1 Q. Frank Barker?

2 A. Yes.

3 MS. HIGGINS: I think that's all the

4 questions that I have.

5 CROSS EXAMINATION

6 BY MS. WORCESTER

7 Q. Mr. Gordon, I believe you testified that up

8 until the day of the closing, it was your

9 understanding that while the sellers wouldn't get

10 anything from the closing, they also wouldn't be

11 bringing money to the closing; is that correct?

12 A. I believe so, yes.

13 Q. Was that, to your knowledge,

14 Mr. McCullough's understanding as well?

15 A. I don't know.

16 Q. To your knowledge, would he have an

17 understanding of what his clients expected to have

18 happen at the closing?

19 A. I don't know.

20 Q. I understand that you apparently didn't

21 receive any drafts of the closing statement prior to

22 the day of the close, correct?

23 A. That's correct.

24 Q. To your knowledge, did Mr. McCullough?

45 (Pages 174 to 177)

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1 A. I don't know. I should correct that, I
2 didn't receive a draft of the closing statement on
3 the day of the closing, either.

4 Q. On the day of the closing, to your
5 knowledge, did Mr. McCullough review a draft of the
6 closing statement?

7 A. I don't know. I would be shocked if he
8 didn't, but I don't know.

9 Q. I'm assuming it would strike you as strange
10 that Mr. McCullough would participate in a closing
11 where he or someone on behalf of the sellers didn't
12 review the closing statement?

13 A. Yes, I would find that strange.

14 Q. So assuming that Mr. McCullough did review
15 the closing statement on the day of the closing, he
16 would have understood that there was a deficit of
17 around 204 thousand dollars?

18 A. You would have to ask Mr. McCullough what he
19 understood. Again, it seems painfully obvious, but
20 you have to ask him what he understood.

21 Q. Prior to sending your letter of October 1,
22 2004, did you have any conversations with anyone
23 from KeyBank that you were going to send such a
24 letter?

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1 A. No.

2 Q. No one from KeyBank was copied on the
3 letter?

4 A. I don't believe so.

5 Q. Other than the conversations that you
6 already testified to today, do you recall any other
7 conversations with anyone from KeyBank up until the
8 day of the closing or after that you haven't
9 discussed, other than -- I know you had lots of
10 conversations with Madeline Kauffman about sort of
11 details back and forth. So maybe let's narrow it to
12 any conversations about CBW being paid a commission
13 that you haven't testified to today?

14 A. I don't know. I hope I've testified to all
15 of them, but I'm not positive.

16 Q. Nothing else stands out in your mind?

17 A. Nothing strikes me. I think Ms. Higgins was
18 exhaustive. Not exhausting.

19 MS. HIGGINS: Oh, thank you.

20 Q. And just for clarification purposes, the
21 questions that you have responded to from
22 Ms. Higgins today that you can't answer, that's
23 based on an assertion of privilege?

24 A. Yes.

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1 Q. Such as one series of questions that I
2 believe you wouldn't answer that involved who was
3 paying you for attending depositions of Frank Barker
4 and Georgia Freid as well as your own deposition,
5 correct?

6 A. That's correct.

7 Q. Were you representing Ms. Freid in her
8 deposition?

9 A. Yes.

10 Q. She was your client?

11 A. Yes.

12 Q. And the same for Mr. Barker?

13 A. Yes. Mr. Barker was there as a keeper of
14 the records of an entity.

15 Q. That you were representing?

16 A. Yes.

17 Q. So it's your objection slash testimony, I'm
18 not sure how to characterize it, frankly, that the
19 information regarding who is paying for those
20 individual's legal services is protected by
21 privilege?

22 A. I believe it is, yes.

23 MS. WORCESTER: That's all I have.
24 (Whereupon, at 3:40 the deposition

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1 concluded.)
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22 STEPHEN F. GORDON

14 In witness whereof, I have hereunto set my hand
15 and seal this 14th day of June, 2005.

21 Linda M. Grieco
22 Notary Public
23 My commission expires
24 December 15, 2011

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